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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW-YORK

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BY NICHOLAS HILL, JUN.  
Counsellor at Law.

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**VOL. I.**

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1883.

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## PREFACE

IN presenting the profession with a volume of cases so soon after my appointment to the office of state reporter, it may be proper to say something by way of explanation. Within the last few years the Justices of the Supreme Court have, by extraordinary exertions, been able to clear off the large amount of arrearages upon their calendar, and to prevent any new accumulations of business. At each of the forty-eight terms, general and special, which have been held within the last four years, with only two exceptions—one in 1838, and the other in 1839—every cause and motion has been heard which was ready for argument; and such as were not disposed of at the time, have usually been disposed of at the next succeeding term. While the judges were making these efforts to avoid delay, the profession complained of the tardy manner in which the reports were published; they having been suffered to fall behind the decisions from one to two years. To remedy this and some other evils, the cases which are now given to the public were placed in my hands with authority to prepare them for publication. This volume, with the first number of another now ready for delivery, contain all the cases which have been placed at my disposal up to the present term of the court.

In commencing this new series of reports, I shall endeavor to accomplish the following objects: 1. To give a faithful record of the decisions, in such cases as may be deemed proper for publication; 2. To furnish such head notes and indexes as will facilitate research; 3. To publish the decisions with the least possible delay; and 4. To give the volumes to the profession at a reasonable price.

As to such errors and imperfections as are discoverable in the present volume, I throw myself upon the generosity of the profession, not doubting that they will make such allowance as may be due to a first effort in the way of reporting. My promise for the future is, that want of success shall not be chargeable to want of exertion.

N. HILL, JUN.,  
*State Reporter.*

ALBANY, January 4th. 1842

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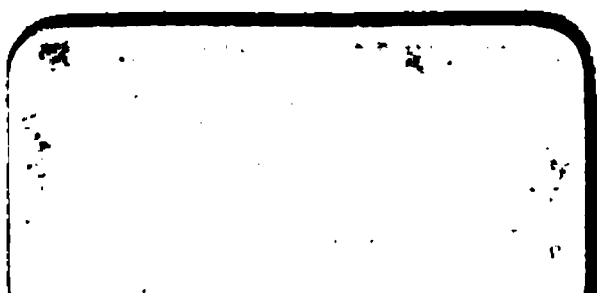
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**IN THE**  
**S U P R E M E C O U R T**  
**OF THE**  
**S T A T E O F N E W - Y O R K ,**  
**IN JANUARY TERM, 1841.**

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**AEBY vs. RAPELYE and others.**

A party who buys an accommodation note before it has been used for any business purpose, stands in the same situation in respect to the defence of usury, as if he were the payee named in the note; and this, though he took the note supposing it to be business paper.

Such a party is not entitled to be protected as an endorsee or holder in good faith, &c. within 1 R. S. 772, § 5.

Where a plaintiff requested the judge to charge in respect to the defence of usury, that it must be proved *beyond a reasonable doubt*, or the jury must find against it; and he refused so to charge, telling the jury that it was enough *if they were satisfied usury was made out*: HELD, that this being nothing more than denying one proposition and affirming another identical with it, afforded no ground for ordering a new trial.

ASSUMPSIT on two promissory notes, one dated February 17th, 1837, and the other February 18th, 1837. Defence, usury. The cause was tried at the New-York circuit, January, 1839, before EDWARDS, C. Judge.

The notes were accommodation notes made by Rapelye, payable to Gilliland & Raymond; and were discounted by the plaintiff at less than their face for the benefit of the payees, after having been endorsed by Gilliland & Raymond and one Carpenter and others, defendants in the cause: but the plain-

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Acby v. Rapelye.

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tiff had no notice that they were given to raise money. Carpenter suffered judgment by default.

The circuit judge charged the jury, among other things, that though the plaintiff bought the notes, without notice that they were mere accommodation paper; still if they were so in point of fact, and never had been passed in the course of business between the parties, they were void in the hands of the plaintiff, if he discounted them at a greater rate than seven per cent. To this the plaintiff excepted.

Upon the point whether, in fact, the notes were discounted at an usurious rate, the evidence not being entirely clear, the circuit judge was requested to charge the jury that the defendants were not entitled to a verdict, unless they had established the usury *beyond a reasonable doubt*. He refused so to charge; but told the jury *that it was enough in this case if, from the testimony, they were satisfied of the fact of usury*. To this, also, the plaintiff excepted. The jury found a verdict for all the defendants; and the plaintiff now moved for a new trial on a case made, with liberty to turn it into a bill of exceptions. The cause was submitted upon written arguments.

*P. S. Crook & C. O'Conner*, for plaintiff.

*S. F. Clarkson & S. Sherwood*, for defendants.

*By the Court*, COWEN, J. The notes were given while the provision of the revised statutes was in force, declaring usurious notes, &c. void, but that this should not extend to an endorsee in *good faith*, for valuable consideration, and without actual notice that the note had been originally given for a usurious consideration. (1 R. S. 760, 1, § 5.) They, however, had their inception by the act of discount; and the case was, therefore, as if they had been directly payable to the plaintiff, on his advance of an usurious loan. The statute does not protect a man who participates in the original concoction of usurious paper; a man who is himself the prominent actor in the usurious transaction. The two cases of *Sauerwein v. Brunner*, (1 Har. & Gill, 477,) and *Cockey v. Forrest*, (3 Gill & John. 483.) settle the

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Safford v. Wyckoff.

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question. The New-York cases were there considered and applied, on a course of legislation exactly like ours, the latter case being the same as the one at bar.(a)

To say that usury must be proved *beyond reasonable doubt*, is substantially the same as saying that the proof must be such as to *satisfy the jury of the fact*. The latter was the charge, though the former was denied. To deny one proposition, and affirm another which is identical with it, forms no ground for granting a new trial, provided the latter be correct. It is in effect a revocation of the error committed in regard to the first. The jury being sworn to exercise their judgment on the evidence, were called to act upon it as reasonable men; and if, as such, they were satisfied of the usury, no reasonable doubt could be said to remain on their minds. It is absurd to say that a rational man is satisfied of a fact, when he sees a reason to doubt its existence. The proposition involves two distinct and opposite positions of the mind—*reasonable conviction* and *reasonable distrust*—and the judge cannot be understood as having left it to the jury, that though they entertained the latter, they were, notwithstanding, to find usury.

New trial denied.

(a) See *Whitworth v. Yancey*, (5 Rand. Rep. 333 ;) *Taylor v. Bruce*, (Gilmer's Rep. 42.)

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**SAFFORD vs. WYCKOFF, President of the Farmers' Bank of Seneca County.**

Where a notary at New-York, ignorant of the residence of an endorser, sent a notice of protest for him, to K. and D, at Albany, by whom it was received in due course of mail, and then deposited in the post office, directed to the endorser at his place of residence; *held*, sufficient to charge the endorser, there being no pretence that it was too late.

A bill of exchange commencing, "*Farmers' Bank of Seneca County*," directing the drawee, after payment, to "*charge this institution*," and signed "*J. J. F., Cash'r*," is to be deemed the act of the bank.

Associations under the general banking law have no authority to make bills of exchange, or to issue any negotiable paper save under the sanction of the comptroller, and in the form prescribed by statute



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Safford v. Wyckoff.

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No action can be maintained against the bank or others upon paper so illegally issued, this appearing on its face.

The intension of an act done must be judged by its necessary consequences. Where these are directly pernicious, the intent to work mischief become a conclusion of law.

*Quere*, whether the endorsee of such paper can recover against his immediate endorser, in an action for the consideration.

*It seems*, the court cannot take judicial notice that a bank is one organized under the general banking law, but the fact must be proved.

A person endorsing a paid bill of exchange, or one otherwise inoperative against others, may be subjected to liability upon it, unless some statute or principle of public policy intervenes to prevent it.

THIS was a joint action under the statute, against the drawer and endorser of a bill of exchange. It was tried before CUSHMAN, C. Judge, at the December circuit, in *Albany*, 1839.

The bill was as follows:

“Farmers Bank of Seneca County.

At thirty days after date, pay to the order of Reuben D Dodge, three thousand dollars, and charge this institution.

J. J. FENTON, Cash'r.

Romulus, Aug. 15, 1839.

To Walter Mead, Esq. Cash. North Am. Trust and Banking Company, New-York.”

*Endorsed*—“Pay to the order of Messrs. Keeler & Durant.

REUBEN D. DODGE.

KEELER & DURANT.

CHARLES A. KEELER.”

*Written across*—“Without acceptance until due.”

The plaintiff proved that the bill was protested by a notary at New-York, September 14th, 1839, and produced the notary's certificate showing, that notice of protest directed to Dodge, was, on the same day, sent by mail to Keeler & Durant, Albany—Dodge's place of residence not being known to the notary.

The plaintiff's counsel then called John H. Meigs, who testified that Keeler & Durant received the notice in due course of mail; and on the same day mailed it to Dodge, directing it to him at his place of residence.

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Safford v. Wyckoff.

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The defendants' counsel objected that the certificate of the notice of protest was insufficient as to Dodge; also, that the evidence of service on him was insufficient.

The plaintiff's counsel then proved the incorporation of the Farmers' Bank of Seneca County, by papers which were produced and verified by the deputy secretary of state, under the general banking law.

The defendants' counsel here objecting to a recovery against Wyckoff, because his name did not appear upon the bill, and there was no evidence to charge the bank; the plaintiff proved by J. M. Woodward, that Wyckoff acted and signed the bills of the bank as president; that the witness was the financial agent of the bank at Albany; and that drafts similar to the one in question had been paid by it, through the witness, who was a broker in Albany and with whom the bank kept its account in the city.

The defendants' counsel objected that if the draft had been issued by the bank, it should have been signed by Wyckoff, as president, or by the vice president, and by the cashier; also that the draft appeared to have been issued by Fenton personally, and not as cashier; also, that the bank or its officers had no power to issue drafts on time, or any other paper except such as had been countersigned according to law. All these objections were overruled by the judge, who directed a verdict for the plaintiff, which the jury rendered. The defendants' counsel excepted; and now moved for a new trial on a bill of exceptions.

*J. Holmes*, for the defendants.

*S. Stevens*, for the plaintiff.

*By the Court*, COWEN, J. We do not perceive what can be alleged as a defect in the proof of notice to Dodge. It was duly mailed at Albany, and directed to him at his place of residence. No objection was made that the notice was too late. Other objections being out of the way, therefore, Dodge would be chargeable.

The bill was clearly enough, on its face, intended to be

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Safford v Wyckoff.

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a draft by the Farmers' Bank, &c. That institution is also chargeable, therefore, unless other objections taken at the trial were available.

The plaintiff took this bill with notice that it was drawn *by*, if not *upon*, one of those institutions which came into existence under the general banking statute of 1838. (*Sess. Laws of that year, p. 245.*) There was enough on the face of the bill to put him on inquiry; and he came forward with proof at the trial of the legal character of the bank, in order to charge Wyckoff as president. If he took the bill in good faith, it was at least necessary, after what had transpired, to show that to have been so, affirmatively.

Then what is the law respecting a bill of this character? The action of such banks is very much limited by the statute, especially with regard to the issuing of negotiable paper. One great object of the statute was, to guarantee the redemption of all such paper, by the assignment of stocks or mortgages of real estate to the comptroller, without whose consent it cannot issue; and when issued with that consent, it must bear a certain form. True, there is no nullifying clause in the statute against negotiable notes or bills, in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied, not only in the general frame and scope of the statute, (*vide Ang. & Ames, 121, 149, 150, 151, 163, and the cases there cited,*) but more emphatically in its policy. Once allow an issue of negotiable paper independently of the state agents, and they will be no longer appealed to. Thus, a security, which it is difficult to preserve, under the most careful supervision, would be entirely thrown away; and the restraint upon excessive issues, so clearly intended by the legislature, would be removed. It was said, in argument, that the statute reaches only such notes as are to be put in circulation as money; and that this bill was not issued for such a purpose. The name of Dodge endorsed in blank, or the name so endorsed by any subsequent holder, would give it just as ready a circulation as if it had been payable to bearer. When the names of Keeler & Durant came upon the bill in question, it might have been passed

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Safford v. Wyckoff

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from hand to hand, and was to all intents as much a circulating bank bill, so far as facility of transfer was concerned, as if it had been payable to bearer. An adjudication that this bill binds the bank, would be a direct precedent for its issue of bills payable to bearer. It could reach the same thing practically, by drawing bills or notes payable to its cashier or other instrument, to be endorsed by him in blank; and then, even if a distinction could be raised between these, and bills or notes payable to bearer, of what use all the precautions of the statute? Its funds, forms, and penalties, would be subjects of derision, and the direct consequence, a circulating medium of the very worst character—a post note system without the semblance of security. Let us not be told of a want of purpose to create such a medium; or that there is no intention to circulate bills like this as money. The intention of an action must be judged by its necessary consequences. When these are directly pernicious, the intent to work mischief becomes a conclusion of law. (*Regina v. Boardman*, 2 Mood. & Rob. 147, 148.) It was said in argument, that bills like this are necessary by way of dealing among banking institutions; and the adjustment of balances was, I believe, mentioned. But there are so many other modes of deal and adjustment, that the argument is not of sufficient cogency to overcome the only feature in the statute, which can render the banks organized under it at all safe as the authors of a circulating medium. We do not speak unadvisedly, nor without reflection. This is not the first time our attention has been called to the question judicially; and we hesitate not to say, that the plaintiff's proof at the trial struck his claim with death, at least as against the bank. It is of the nature of a note or bill that no one can be made directly liable upon it, unless he appear on the instrument to be a party. And this bank so appearing, operated as notice to the plaintiff that the bill was a nullity.

It was not accepted by the North American Trust and Banking Company, which we take to be another institution erected under the general banking law. Had it been so accepted, and the plaintiff had taken it with such accep-

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Safford v. Wyckoff.

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tance, or had even procured the acceptance, this would certainly not strengthen his claim. He would then have been still more obviously a party to the fraud. *Non constat*, however, but he may have been ignorant that the parties drawees, were prohibited the putting of such paper in circulation; not that he is to be held ignorant of the law, but he may not have known, nor do we know judicially in this proceeding, that the drawees are not a corporation which may issue all kinds of negotiable paper. The plaintiff may be in this respect a perfectly innocent holder; and we must intend that he is. There was no offer on the trial to show that the drawees were an institution under the general banking law; and we must intend in the plaintiff's favor till that fact be shown. But, as we have already seen, this takes from him only part of the vicious intention to participate as a dealer in an illegal currency.

We admit the defence is an ungracious one, both as to Dodge and the drawers; it is not, however, for their sake, but for that of the statute and the public, that we feel constrained to give full scope to this defence. There would be more difficulty in sustaining it as to the endorser, were it not to be regarded as an obvious attempt by all parties, (himself among them,) to violate a principle of public policy. The mere nullity of the bill in respect to the drawers, because it wants the formal signatures and sanctions required by the statute, would be no defence for the endorser. If a man will endorse a paid bill, or one which is otherwise inoperative against others on private grounds, he is yet chargeable. But when he comes knowingly to aid in sending forth a prohibited currency upon community, the *mala fide* holder can no more recover against him, than if he had become a party in order to defraud creditors, or to defraud a family by marriage brokerage. The statute makes it a misdemeanor for the comptroller to sanction an issue of bills or notes by these institutions, until after a deposit with him of the proper fund for their redemption. But I do not propose to go over the various restraints contained in the statute. It is studded with numbers of them—all intended as out-works—as defences against issues of it

## Swick v. Sears.

redeemable paper. It would be imputing to the enacting power something worse than absurdity to suppose, that at a time when parts of this country were flooded with such issues, it intended to allow these banks, by the change of a few words, to set at naught the prescriptions both of legislative enactment and of sound policy. It is not necessary to deny that the endorsee may recover against his immediate endorser. Here the endorser sought to be charged is not immediate; and beside, the action is in that artificial form which must be sustained by the bill as such, or not at all. It is impossible, we think, for the plaintiff, even as between himself and Dodge, to escape the character of a *mala fide* holder of paper, issued contrary to public policy; not to say, contrary to public morals. He can no more recover, therefore, than if he had taken the endorsement of a note, with knowledge that it had been given in consideration of a stipulation for general restraint of trade. (*Chit. on Bills*, 92, a, and 94, *Am. ed. of 1839.*) There must be a new trial, the costs to abide the event.

New trial granted.(a)

(a) See *Delafield v. Kinney, president, &c.* (24 *Wend.* 345.)

## SWICK vs. SEARS.

Parol evidence of what the parties to a deed of lands agreed and declared, at the time of its execution, with respect to the effect of a clause of reservation contained in it, is inadmissible to aid or control its construction. After ascertaining what the state of things was, which existed at the time the deed was executed, it must be left to speak for itself.

A grantor in a deed to the defendant, containing a clause which he now claims reserved to him an undivided third of the premises, subject to dower, stood by, subsequent to its execution and when the defendant purchased of the widow and others, advised the purchase, and declared it would pass the third part reserved. Yet *held*, that he was not thereby estopped, at law, from asserting his present claim. Where S., owning the entire interest in certain premises subject to C.'s right of dower, gave a deed thereof, reserving *the equal undivided third part that is covered by the dower right of C.*; *HELD*, that the grantee took the whole premises subject to the right of dower, and not merely two-thirds

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Swick v. Sears.

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**EJECTMENT** for one equal undivided *third* part of two pieces of land, one containing 74, and the other 15 acres, in the township of Hector, tried at the Tompkins circuit in February, 1838, before MONELL, C. Judge.

Several years before the trial, Tunis Swick died seized of the premises in question, leaving a widow named Charity, who afterwards married Eldreth Covert; and leaving also five children, of whom the plaintiff was one. All the other heirs had conveyed their interests to the plaintiff. The plaintiff, then, by warranty deed dated March 31, 1836, conveyed the said two parcels of land to the defendant in fee, describing the same by metes and bounds; and immediately after the description was a reservation in the following words: "Reserving the equal undivided one third part of above described premises that is covered by the dower right of Charity Covert." The judge decided that the reservation was absolute, of one third of the premises, and that the plaintiff was entitled to recover that third.

The defendant then offered to prove that, when the deed was executed, it was intended and agreed by the parties that the reservation should cover nothing but the dower right of Charity Covert, the widow; and that the whole interest of the plaintiff, subject to the right of dower, was intended to be conveyed, and that the plaintiff declared and agreed so at the time. This was overruled. The defendant then offered a deed to himself, dated April 8, 1836, from the widow, and Covert, her then husband, and John E. Swick and Minor Swick, two of the heirs at law of Tunis Swick, for the equal undivided third part of the premises in question: and also offered to prove that when this deed was executed, the plaintiff was present, advised that it should be given, and declared that it would pass the undivided third part reserved in his deed, and so make the defendant's title perfect; that, in consequence of this advice, the defendant accepted the deed from the widow and two heirs, and paid the consideration money therein mentioned, \$722,97. This was also overruled; and a verdict having been rendered for the plaintiff, the defendant now moves for a new trial on a case.



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Swick v. Sears.

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*A. Gibbs*, for defendant.

*M. T. Reynolds*, for plaintiff.

*By the Court*, BRONSON, J. The offer to show, by parol evidence, what the parties intended by the deed, or the reservation which it contains, was properly overruled. After ascertaining the existing state of things at the time the deed was executed, the instrument must be left to speak for itself. We cannot give any effect to what the parties may have said at the time, by way of enlarging the operation of the deed, without, in effect, allowing the instrument to be contradicted by parol, and saying that the title to real estate may pass without writing.

Evidence was also offered to show, that the plaintiff stood by and not only saw the defendant buy of others, but advised him to do so, without disclosing the title which he now sets up. This evidence was also properly rejected. The plaintiff is not estopped, in a court of law, to assert his title. The case is not like *Sayles v. Smith*, (12 *Wend.* 57,) to which we have been referred. If the defendant finds it necessary to rely upon this part of his case, he must go into a court of equity.

But I think the judge erred in the construction which he put upon the deed. Let us see what was the existing state of things at the time the conveyance was made, and concerning which the parties must be supposed to speak. The plaintiff owned the entire interest in the two parcels of land, subject only to a right of dower in Charity Covert, which was an estate for her life in an undivided third of the property. The question is, how much did the plaintiff intend to alien? Did he intend to part with all his interest, or only two-thirds of it? I think he intended to grant all his interest; or, in other words, the entire estate, subject to the right of dower, which was not his to sell. If the intention had been to grant only two-thirds of the estate, as the plaintiff now contends, the granting part of the deed would probably have contained some such

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words as these—"two equal undivided third parts of the following parcels of land," &c., instead of commencing with words covering the whole estate, and then ending with a reservation of one third of it. But we must look a little more closely to the reservation. "Reserving the equal undivided one-third part of above described premises"—If the clause had stopped here, there would have been a plain exception of one third of the thing granted, and it would be difficult to resist the plaintiff's claim. But we are not at liberty to take one-half of the clause, and reject the residue. We must read, and, if possible, give effect to every word which it contains. The remaining part of the clause points directly to the right of dower, as the subject which the parties had in mind—reserving one-third of the premises "that is covered by the dower right of Charity Covert." Looking at the entire clause, I am unable to resist the conclusion, that the plaintiff intended to convey the whole estate, subject to the existing right of dower. It requires but a very slight change in the phraseology to make the matter quite plain. The plaintiff says by the deed, "I grant the two parcels of land, 'reserving'"—excepting, or subject to—"the dower right of Charity Covert," *which covers* "the equal undivided one-third part of above described premises." If the plaintiff intended to reserve one third of the estate to himself, why did he mention Charity Covert, or her right of dower? I do not see what answer can be given to the question. In truth, the plaintiff is driven to the necessity of taking one half of the clause, and rejecting the residue, before he can make out his case. We think he is not at liberty to do so, and that upon the true construction of the deed, the plaintiff has parted with the entire estate which he had in the land. The verdict must therefore be set aside.

New trial granted.

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Mott v. Robbins.

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**MOTT vs. ROBBINS and another.**

A bond given to the sheriff by a deputy and his surety, on the appointment of the deputy to office, conditioned, among other things, for saving the sheriff harmless from liability, on account of the deputy's conduct, and for paying over to the sheriff one half the sheriff's fees arising from business done by the deputy, is not within the statute against the taking of bonds by sheriffs, &c. *colore officii*, or the statute against selling offices.

Where the principal, on appointing a deputy, takes an agreement from him for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void.

Otherwise, where the principal merely reserves a part of the fees of his office, or a sum certain, which is to come out of the profits.

DEBT on bond, executed by a deputy sheriff and his surety, to the sheriff, on the deputy receiving his appointment; tried at the Oneida circuit, April 17th, 1839, before GRIDLEY, C. Judge. The condition of the bond recited the appointment of the deputy by the sheriff, and then provided, among other things, for the sheriff's indemnity from all damages, &c. on account of the deputy's conduct as such, and for paying over to the sheriff one half the fees, &c. Breaches were assigned, and issue being joined, one objection taken by the defendants on the trial was this—that the bond sued upon was void, within the prohibition in the revised statutes against sheriffs taking bonds *colore officii*, and against selling offices, &c. The objection was overruled, and this point, among several others, came here upon bill of exceptions.

*W. Tracy*, for defendants.

*J. A. Spencer*, for plaintiff.

*By the Court*, BRONSON, J. We are referred to the statute which prohibits the sheriff from taking a bond or other security *colore officii*, (2 R. S. 286, § 59,) and to the statute against selling offices, (*id.* 696, § 35, 37,) to prove that the bond of the deputy is void. The sheriff has authority

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to appoint deputies, (1 *id.* 379, § 73;) but there is no law regulating the amount of compensation which the deputy shall receive, as was the case in *Tappan v. Brown*, (9 *Wendell*, 175.) The sheriff has here taken a bond from the deputy for the faithful discharge of his duties, and to account for and pay over *one half* of the fees of such business as should be done by the deputy. There can be no doubt that the bond is valid. The question has been long settled in cases coming under the statute, 5 and 6 *Ed.* 6, *ch.* 16, from which our statute against the sale of offices was taken. When the principal, on appointing a deputy, takes an agreement for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void. But where he reserves a part of the fees of the office, or a sum certain, which is to come out of the profits, the contract is good. And the reason why the principal may take a stipulation for a part of the fees or profits, is, because the whole belongs to him; and, as has been said, "it is only reserving a part of his own, and giving away the rest to another." (*Godolphin v. Tudor*, 2 *Salk.* 468. 6 *Mod.* 234, *S. C.* 1 *Bro. P. C.* 98, affirmed in the house of lords. *Culliford v. Cardinal*, *Comb.* 356. 12 *Mod.* 90, *S. C.* by the name of *Culliford v. Cordonmy*. *Comyn's Dig. tit. Officer*, K. 1.) In the case of *Tappan v. Brown*, (9 *Wendell*, 175,) a part of the fees belonged by law to the deputy. But in this case they all belong to the sheriff; and the agreement to divide them, is only a mode of settling the compensation of the deputy for such services as he might render. Such an agreement the parties were at liberty to make.

New trial denied.

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**Banyer v. Ellice.**

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**BANYER and others vs. ELLICE.**

Where by consent of parties a general verdict was taken at the circuit, subject to the opinion of this court as to certain questions raised at the trial, and the facts were neither agreed on, nor found by the jury, agreeably to the standing rule on that subject; the court ordered a new trial because of the omission.

The rule referred to requires quite as much fulness and certainty, respecting the facts, in a case made, as in a special verdict.

**EJECTMENT**, tried at the Essex circuit, January, 1839. before WILLARD, C. Judge. On the trial, the evidence was mostly documental; and among a number of questions there raised and decided against the defendants, was this: whether the lot in question did or did not lie in Summer Vale patent. The judge decided, from the documental evidence, that it appeared it did. In the course of the trial, much evidence was objected to, and its effect, on the whole, was finally questioned: 1. as not entitling the plaintiffs to recover any thing; and 2. as, at all events, not entitling them to recover the entire lot. On the latter question coming up, the parties, on the recommendation of the circuit judge, consented that, as a correct determination of it required a careful examination of documental evidence quite voluminous and complicated in its nature, a verdict should be taken for the plaintiffs, subject to be modified in this particular by the supreme court, and subject moreover to the opinion of the supreme court on the other questions raised and disposed of on the trial; a new trial to be awarded, if the judge had erred in deciding any material point against the defendant. Verdict accordingly. The defendant now moved for a new trial on a case, in which it did not appear either that the facts were agreed upon at the circuit, or that they were found by the jury.

*J. Burnet*, for the defendant.

*A. C. Hand*, for the plaintiffs.

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*By the Court*, COWEN, J. The 36th rule of this court abrogates the practice of taking a general verdict, subject to the opinion of this court, on all the evidence given on the trial. It then proceeds to declare, that "no verdict shall hereafter be taken subject to the opinion of the supreme court, except where the parties shall agree on the facts proved, or where such facts shall be found by the jury."

The object of this rule was two-fold; first, to divide more accurately the offices of the circuit and the bench; and second, to expedite the business of the court. The old practice of taking a verdict for the plaintiff, subject to the opinion of the court, confounded the duties of judge and jury, and rendered it often necessary to exercise the latter on an imperfect statement of the evidence, and at best, in a very unsatisfactory manner. The second object is effected by diminishing the number of cases in which this court would otherwise be called on to decide questions of fact, and confining them, as far as possible, to their more appropriate duty of passing on the law of the case. Both objects are important, and should not be lost sight of in practice. The rule in question requires quite as much fulness and certainty in a case, on a verdict subject to the opinion of the court, as in a special verdict. The only difference lies in the form. In the case made, the facts are either to be found by the jury, or agreed by the parties; in the special verdict, they are to be found. In the case before us, neither of the requisites demanded by the rule is complied with. For this reason, we are of opinion that a new trial should be granted, the costs to abide the event.

Ordered accordingly.

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 American Insurance Company of New-York v. Bryan.
 

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**THE AMERICAN INSURANCE COMPANY OF NEW-YORK vs.  
BRYAN & MAITLAND.**

Where a policy upon the cargo of a vessel, insured in express terms, among other things, against "*thieves, &c., barratry of the master and mariners,*" &c. HELD, that a loss by theft, whether the offence was committed by the crew or others, was covered by the policy.

The term "*thieves,*" in such a policy, is not limited in its application to *external* or *assailing thieves* merely, but extends to thefts from within, by mariners, passengers, &c.

ON error from the superior court of the city of New-York. The action below was by Bryan & Maitland against the American Insurance Company of the city of New-York, upon a policy of insurance on the cargo of the ship Kentucky, at and from New-York to New-Orleans; and at and from thence, by steam-boat or boats, to Tuscumbia, (Alabama.)

All or most of the goods arrived in the Kentucky, at New-Orleans, and were transhipped there by the steam-boats Mississippian, Algonquin, and Ben Sherrod, for Tuscumbia.

Part of the cargo in question was alleged to have been stolen, either from the ship or boats in the course of their progress, viz. certain dry goods shipped in boxes.

The declaration of the perils covered by the policy was thus:—Perils "of the seas, men-of-war, fires, enemies, pirates, rovers, *thieves*, jettisons, letters of mart and countermart, surprisals, takings of sea, arrests, restraints and detainments of kings, princes, &c., *barratry of the master and mariners*, and all other perils, losses or misfortunes that had or should come to the hurt, detriment or damage of the said goods," &c.

The loss being proved, the counsel for the defendants contended, that the established construction of the word *thieves* in the policy, is *assailing thieves*; and not a felonious taking by the crew. But the chief justice charged the jury, that a loss by *theft*, whether by *assailing thieves*.



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or by the *embezzlement of the crew*, or by *whatever persons*, was a loss within the policy; and that, if the jury should be satisfied from the evidence that the illegal depredation had taken place, and had been perpetrated upon the goods under the protection of the policy, on board the ship, or the steam-boats, the plaintiffs having counted upon a loss by *theft* and upon a loss by *barratry*, would be entitled to their verdict.

The counsel for the defendants excepted; and the verdict and judgment being for the plaintiffs, the defendants brought error to this court.

*S. Stevens*, for plaintiffs in error.

*B. D. Silliman*, for defendants in error.

*By the Court.* COWEN, J. The plaintiffs below, having no interest in or control over the ship or steam-boats, took an insurance on their goods, against *thieves, barratry of the master and mariners*, and other perils. The goods were stolen in their progress, either from the ship or boats, while they were covered by the policy; and it did not appear whether they were stolen by one connected with the vessel as master, mariner, passenger, &c., or by a stranger. The court below thought that not material under the specific words in the policy, and directed a verdict for the plaintiffs accordingly.

It must be conceded, I think, to be a matter of great doubt, whether, under the form of the old policies which came over from the continent to England in the course of the sixteenth century, either simple larceny committed on shipboard, or the barratry of master or mariners, was reckoned among the risks insured against. *Roccus*, who wrote in 1655, answers clearly in the negative as to larceny; but leaves the question of barratry in doubt. (*Notes*, 42, 3, 4. *Vid. also note* 89.) It is quite obvious, however, from the notes cited, that he based himself on the general nature of insurance, as an indemnity against *accidents* merely, and

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the clauses in the then prevalent policy, conforming to its nature; thus covering risks strictly *fortuitous* in their character. Accordingly, in note 41, he holds piracy and robbery to be within the risk, because *fortuitous* or *accidental*; but in note 42, a theft *on board the vessel*, is distinguished, because, among other reasons, it is considered as proceeding from *negligent custody*, and *not from accident*. In note 44, barratry of the master is set down as doubtful, on the same ground, namely, because it is not fortuitous. More modern writers speak of the same principle, when considering the general nature of insurance. Millar says that, from the nature of the contract of insurance in general, it seems to follow, that the insurer means to subject himself to the consequence of all perilous *accident*, or *unforeseen* misfortune, which may happen to the subject in the course of the adventure; but it is for accident he is liable, and for *accident only*. (*Millar's Elem. of the Law of Ins.* 130.) This learned writer afterwards proceeds at p. 138, to consider the question, whether barratry enters into the nature of insurance or not. He examines it relatively to the ship owner, and shipper, on principle, authority and practice; but finally admits the doubt to be superseded by the almost universal practice of modern nations to insert an express clause covering this risk. The arguments which he submits in the course of the discussion have a direct reference also to the question, whether theft on ship-board should be covered by the nature of insurance; and lead the mind to inquire, whether the word *thieves*, in the British policies, was not introduced with a view to remove a doubt on that head.

If the larceny in the case at bar had been clearly imputable to either the master or mariners belonging to the ship or boats, no question could have arisen; for it has long been entirely settled that such embezzlement comes pre-eminently within the notion of barratry. (*Weskett, tit. Barratry, and the books there cited. Cunningh. on Ins.* 159. *Condy's Marsh.* 515, a. *Hughes on Ins.* 176, note (d.) *Am. ed. of 1833.* 1 *Phil. on Ins.* 613, 615, 616.)

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The proof leaving it ambiguous, however, whether the goods were not stolen by a passenger or stranger, the chief justice told the jury, that a larceny by any one would be equally within the terms of the policy. This raises the question, whether the insurance against thieves extends to a theft on ship-board by persons other than the master or mariners.

The enumeration of risks in this policy is the same with that in the present English policy at Lloyd's, (*M'Culloch's Commercial Dictionary, Insurance*, p. 703;) and the addition of the word *thieves*, to those of *pirates* and *rovers*, seems for a long time to have been a peculiarity in the English form. In the prominent instances given by Weskett's collection of forms, in 1783, viz. the policies of Cadiz, Copenhagen, Hamburgh, Leghorn, Rouen and Stockholm, the word does not occur; though the same writer includes it in the then English form, in which it stands, as in the case before us, superadded to the words *pirates* and *rovers*, in immediate contiguity. (*Vide Wesk. tit. Policy, Cadiz, &c.*) Most of these policies include barratry; that of Leghorn, robbery; while others content themselves with such general words as, upon the ancient rules of construction, would extend to forcible depredations.

The term *thieves*, is broad enough in law to cover both compound and simple larceny, and, in common parlance, to include the latter. I do not see, therefore, how, upon the ordinary principles of construction, it can be doubted that the word was intended to reach at least simple larceny committed by any one. A difficulty has, however, arisen on what has been considered a species of positive authority against such a construction. *Malynes*, who wrote in the early part of the seventeenth century, (in *ch. 25*, of his *Lex Merc.*) says: "If there be thieves on ship-board, within themselves, the master of the ship is to answer for that, and to make it good, so that the assured are not to be charged with any such loss; which sometimes is not observed." (*Vide Mal. 3d ed. published 1656, p. 109*) The remark has been implicitly repeated by many writers since,

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down to the commentaries of the learned Chancellor Kent. Malyne mentions no authority, either of any book or adjudged case; and there can be very little doubt that he was speaking from the ancient writers, and applying them to the English policy, without adverting to the fact that the old policies *omitted*, and the English policy *included*, the word *thieves*. Several of the latter writers seem to have spoken with the same inadvertency; as it is natural they should, on the authority of so respectable a writer as Malyne has always been taken for. *Roccus*, however, admonishes us that we are to attend particularly to the words of the policy, in order to see whether it covers thefts. In note 43, he says, where a *theft* is committed by nocturnal robbers in port, it seems the insurers are not liable; but this is on account of the insurance being against *shipwreck*, *enemies* and pirates, only. If it be in general terms "*that the goods shall be conveyed safely to a particular place*," then the insurer is bound even for a *theft* committed by robbers, in port; and *for all possible risks during the voyage*. A common carrier is called in our law an insurer, on account of his implied undertaking being general, like *Roccus*' instance of a policy; for the very reason that he is responsible for losses by robbery, and simple larceny. Burn, notwithstanding the remark of Malyne, after reciting the English enumeration of risks, says, it is not clearly ascertained that if there be thieves on ship-board, this is such a case as comes within the terms of the policy; though it was held in *Hartford v. Maynard*, before Lord Mansfield, in 1785, that the insured is liable for a robbery committed by thieves from without. (*Burn on Ins.* 12.) Park also cites both Malyne, and *Roccus*, note 42, in favor of Malyne's remark; but adds: "his (*Roccus*') reasoning on this subject is by no means conclusive as to *English insurances*, on account of the *express terms* of the contract. (1 *Park on Ins.* 30, 31, *Lond. ed.* 1809.) With deference, it seems to me that this mere denial of conclusiveness comes much short of presenting *Roccus*' argument in its true force. Connecting his notes, 42 and 43

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they furnish clear reason for the English policy covering a theft from within as well as without; viz. theft is not covered, because—1. The owner is bound to take care of the goods, and the loss is imputable to his own negligence, not accident; 2. Because the master is liable; 3. Because the insurer is not liable for barratry; but 4. The insurer may be liable for theft *on express words*. Roccus was a judge of the *Magna Curia*, at Naples, and was, no doubt, speaking of a policy which made no express mention either of barratry or theft. Mr. Millar says, after citing note 42, that among all the older commentators, it was matter of disquisition, whether damage by theft was to be reckoned one of those accidents which are provided against by the policy. (*Millar*, 145, 146, *note*.) He accordingly puts it, on summing up from the writers, old and new, and upon principle, that *unless there be an express clause to that effect*, the insurer is liable neither for the fault nor fraud of the ship owner, master or crew. Throughout his whole train of reasoning, he bases himself on the *general nature of insurance*, conceding that the liability of the underwriter may be enlarged in all cases where no inflexible principle of morals would be violated. Accordingly, points left doubtful by the old writers have been, from time to time, cleared up, by the introduction of new words into the policy. Losses by barratry of master and mariners, were, in this way, made the subject of insurance in most countries, though in some, the words are forbidden by ordinance, as *contra bonos mores*, (*Millar*, 149, 150.) Lord Mansfield censured the practice of the owner thus insuring, though I do not perceive that the like censure has ever been extended to the shipper of goods; and the universal practice of Holland distinguishes in favor of such an insurance by the latter, while the former is tied up to an insurance against the barratry of the crew only. (*Vide Millar*, 149, 151.) Some policies on goods mention not only the barratry, but *negligence*, both of master and crew. Such is the form at Copenhagen. (*Millar*, 151, 152. 2 *Magens*, 323, 324. *Weskett*, 144.) The same policy by the owner is made

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expressly to cover the negligence of both; but the barratry of the crew only. (*Id.*)

Without multiplying examples, the remarks of *Molloy*, (*B.* 2, *ch.* 7, § 7,) are true, viz. "The policies now-a-days are so large that almost all those curious questions that former ages, and the civilians, according to the law marine, nay, and the common lawyers too, have controverted, are now out of debate; scarce any misfortune that can happen, or provision to be made, but the same is taken care for in the policies that are now used; for they insure against heaven and earth, stress of weather, storms, enemies, pirates, rovers, &c. or whatsoever detriment shall happen or come to the thing insured, &c. is provided for." Is not the mind irresistibly led to believe that the word *thieves*, in the English policy, was introduced as a modification, and intended to obviate one among those "curious questions" which we have seen existing in respect to the general nature of insurance, as it stood on the old policies? *Phillipps*, in his second edition, (1st vol. 649,) puts it cautiously, that the words *thieves* and rovers, have not, in general, been understood to cover losses by theft, unless accompanied by violence, citing Park, Emerigon, Roccus and Kent. To these may be added. Weskett and Marshall; but under what qualification all these learned writers should be read, we have already in part seen. Some of them clearly could not be speaking in respect to the modern English policy; others did not advert to its peculiar words; while Mr. Park, as already shown, suggests the natural qualification. That the English policy is not confined to *assailing* thieves, but covers at least a simple larceny committed by a stranger to the ship, has also lately been held by the present learned chancellor of this state, whose reasoning on the question tends clearly to show that he would, if necessary, have extended the policy to theft committed by a passenger. (*The Atlantic Ins. Co. v. Storrow*, 5 *Paige*, 285, 292, 293.) This case also adjudges the doctrine as laid down in *Roccus*, (*note 27.*) and *Millar*, (*p.* 141,) viz. that the insurer is considered so far a principal,

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as against the owner and master, that, on paying the loss, he becomes subrogated to the rights of the assured. He may, therefore, recover in equity for the loss he has paid; or, if the insured himself proceed primarily against the owner or master, thus obtaining his indemnity, or if he cancel or otherwise discharge the bill of lading, the act enures to the benefit of the insurer. This takes away the objection that the insurance would countenance want of due care in the carrier.

Mr. Hughes, after noticing the remark of Emerigon, which is the same in substance with that already quoted from Malynes, observes, that the association of the word *thieves*, with *pirates* and *robbers*, seems to show that external thieves were intended by the framers of the English policy. He immediately adds, however, what I cannot but consider as much more obvious, that, "as the term *thieves* is certainly capable of a more extended interpretation than the two words which precede it, and is in itself applicable to persons *on board* the ship, by whom depredations may be committed, cases may occur where thefts, committed by persons who may be on board the ship, as passengers, or even by mariners, may be included in the policy, provided they occurred without the fault of the insured." He remarks, in a note, that "when thefts are committed by mariners, the underwriters are liable as for barratry." (*Hughes on Ins.* 176, *Am. ed.* of 1833.) These observations cover the whole question before us. The court below were doubtless governed by them; and, after the best consideration we have been enabled to bestow upon the question, which was well argued by counsel, we think the court were correct.

**Judgment affirmed.**

COVENEY *vs.* TANNAHILL and others.

In general, confidential communications between attorney and client, concerning the matter to which the retainer relates, are not to be disclosed by the attorney in court, unless the client waives his privilege.

The form of the communication, as whether by an oral statement, or by delivering a written instrument, makes no difference in the application of the rule.

An attorney may be called against his client to prove the existence of a paper deposited with him by his client, and that it is in his possession, with a view to enabling the party calling him to resort to secondary evidence. But he cannot be compelled to produce the paper or state its contents.

An attorney cannot be compelled, on a *subpœna duces tecum*, to produce the papers of his client, entrusted to him.

The privileged relation of attorney or counsel, and client, can only exist, *it seems*, for lawful purposes; and hence, if the client confide to them a criminal design, or they be present when a wrong, either public or private, is done by their client, their knowledge thus acquired is not privileged.

An attorney who is present at a transaction in the way of business between his client and a third person, is not privileged as to what then passed.

When the facts are disclosed, it is for the court, and not the witness, to decide whether he is privileged or not.

Where an account stated, containing a written acknowledgment of a balance due the defendant from T. E. and M., partners, was introduced in evidence to charge all of them, though it was signed by T. alone; and the other partners set up that it was signed by T. in fraud of their rights, after an injunction served upon T., at their suit, restraining him from interfering with the partnership accounts; and S., the plaintiff's counsel, was called by E. & M., and asked *whether he was present when the account stated was signed, and when and where it was signed, and who were present*; HELD, that the matters propounded did not come within the rule as to privileged communications, and that S. was bound to disclose all that was said or done between T. and the plaintiff, on the occasion alluded to, so far as either was pertinent to the issue.

If, however, any communications passed between the plaintiff, and S. the counsel, apart from T., they, *it seems*, would be privileged.

And held, moreover, that S. was privileged from answering, whether, *when he first saw the account stated, the evidence of a settlement was endorsed on it.*

MOTION by the defendants, Edwards & McKibben, to set aside a report of referees made in favor of the plaintiff. The defendants were partners under the name of John Tannahill & Co., and, in this action of assumpsit, the plaintiff gave in evidence an account stated in writing on the 3d September, 1839, with an acknowledgment at the end.



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signed John Tannahill & Co., in the handwriting of Tannahill, by which a balance was admitted to be due the plaintiff of \$747,36. The defendants, Edwards & McKibben, proposed to show that Tannahill had made this written acknowledgment, after an injunction out of chancery at the suit of his partners had been served upon him, restraining him from interfering with the partnership accounts; and that Tannahill signed the acknowledgment for the purpose of defrauding his said copartners. They called Seth E. Sill as a witness, who acted as counsel for the plaintiff on the hearing, and put to him the following questions: 1. Whether he was present when the account stated was signed; 2. If so, when and where was it signed, and who was present; 3. When he first saw the said account stated, and whether the acknowledgment of a settlement and balance due was endorsed on the account when he first saw it. To which questions the witness replied, that all his knowledge of the writing had been obtained by him as counsel in this cause, and that he could not answer the questions without violating the confidence reposed in him by his client as counsel in the cause. The referees decided that the witness should not answer the questions put to him; they said the facts which the defendants offered to show were admissible, and they would hear them if proved by any other witness. The defendants then offered to prove a set-off exceeding the amount of the plaintiff's demand; but this was rejected, on the ground that the defendants were concluded by the settlement, unless it could be proved that there was some mistake in it. A report was made in favor of the plaintiff.

*W. L. G. Smith*, for defendants.

*Hawley & Sill*, for plaintiff.

*By the Court*, BRONSON, J. Confidential communications between attorney and client, concerning the matter to which the retainer relates, are not to be disclosed in court, unless the client waives his privilege. The mode in which the information is communicated—whether by an oral state-

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ment of facts, or by delivering a written instrument—cannot be important. The principle is the same in whatever way the information passes. The policy of the law allows a man to make the best defence in his power. Whatever may be his delinquency, he is permitted to confer freely with his counsel, and to place in his hands any paper touching the matter in question, without the peril of having his confidence betrayed under the forms of law. The attorney may be called to prove the existence of a paper, and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents. But he cannot be compelled to produce or disclose the contents of a paper which has been deposited with him by his client. (*Brandt v. Klien*, 17 *John. R.* 335. *Jackson v. McVey*, 18 *id.* 330. *Rex v. Smith*, 1 *Phil. Ev.* 142. *Brard v. Ackerman*, 5 *Esp. R.* 119. And see *Bevan v. Waters*, 1 *M. & M.* 235; *Eicke v. Nokes*, *id.* 303; *Vin. Abr. Discovery*, I; *Durkee v. Leland*, 4 *Verm. R.* 612; *Anon.* 8 *Mass. R.* 370.) In *Wright v. Mayer*, (6 *Ves.* 280,) Lord Eldon said, he never heard of a *subpœna duces tecum* upon an attorney, to produce the papers of his client. In *Rex v. Dixon*, (3 *Burr.* 1687,) the point was decided, that the attorney was not obliged to obey such a *subpœna*. Lord Mansfield said, that instead of producing the papers, the attorney ought immediately, upon receiving the *subpœna*, to have delivered them up to his client.

This privilege of the client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference, in principle, between *communications made* by the client, and *acts done* by him in the presence of the attorney. It may be, and undoubtedly is, sound policy to close the attorney's mouth in relation to the former, while in many cases it would be grossly immoral to do so in relation to the latter. It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defence; but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as

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counsel to see, or aid in the transaction. Indeed, I think there can be no such relation as that of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes.

Chief Baron Gilbert, after stating the general rule in relation to the exclusion of counsel, says: "Where the original ground of communication is *malum in se*, as if he be consulted on an intention to commit a forgery or perjury, *this can never be included within the compass of professional confidence*; being equally contrary to his duty in his profession, his duty as a citizen, and as a man. But if such offence, as forgery for example, *committed without his being privy*, comes to his knowledge in the course of confidential transactions with his client in the way of business, he shall not be compelled to assist in proving it." (1 *Gilb. Ev.* 277, *Dublin*, 1795. See *Clay v. Williams*, 2 *Munf.* 105; *Parker v. Carter*, 4 *id.* 273; *Rex v. Haydn*, 2 *Fox & Smith*, (*K. B. in Ireland*,) 379.)

I will not undertake to say how far the distinction between the communications and the acts of the client may extend; but there can be no good reason for excluding the attorney when he has witnessed a transaction in the way of business between his client and a third person; as the adjustment of an account, the execution of a deed, the payment of a sum of money, the giving up of securities, or the like. It is not necessary that a man should have an attorney to witness his dealings with third persons; and if one is called in, I can see no reason why he, like any other person who was present, should not be sworn to prove what was done.

In the case at bar, I feel no difficulty in saying, that Mr. Sill should have been required to answer the first two questions which were put to him. He says he could not do so without violating the confidence reposed in him by his client. But that was a question for the referees—not the witness. When the facts are disclosed, it is for the court to decide whether the witness should be required to answer.

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The substance of the first two questions put to the witness is—" *Was you present when the account stated was signed ; when and where was it done, and who was present ?*" The witness answered, that all his knowledge of the writing had been obtained by him as counsel in the cause. He evidently did not intend to say that he was not present, &c., for that would be answering, instead of declining to answer, the questions put to him. The meaning of the answer is, that if the witness was present and saw the paper signed, &c. he was so present as counsel for the plaintiff. The case then comes to this: The plaintiff, in adjusting an account with a third person, and procuring a written acknowledgment of a balance due, calls in a counsellor at law to witness the transaction ; and the question is, whether the attorney shall be permitted to speak without the leave of his client? Upon that question I cannot entertain a doubt. What was done and said between the plaintiff and Tannahill in the way of business, cannot be turned into a confidential communication between attorney and client, merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to the attorney, and he might have been required to answer, not only when and where the account was signed, but as to every thing that was done and said between the plaintiff and Tannahill on that occasion, so far as the matter would be pertinent if proved by any other witness. If any communications passed between the attorney and client apart from Tannahill, these may be privileged ; but nothing else.

In *Lord Say & Seal's case*, (10 Mod. 40,) the objection to a common recovery was, that there was no tenant to the *præcipe* ; and on producing a deed, the attorney who had been entrusted in suffering the recovery was called to prove that the deed had been ante-dated five months ; and he was admitted. The court said, that " a thing of such a nature as the time of executing a deed, could not be called the secret of his client ; that it was a thing he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or any body else,

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might inform the court of." From the manner in which this case is cited by *Buller*, (*N. P.* 284,) it may be inferred that the attorney was a subscribing witness to the deed, but no such fact is mentioned by the reporter. In *Rex v. Watkinson*, (*2 Str.* 1122,) the defendant was indicted for perjury in an answer in chancery, and his solicitor, who was present when the answer was put in, was called to identify the defendant as the person who was sworn; but Chief Justice Lee would not compel the solicitor to testify. "*Quære tamen*," says the reporter, "for this was to a fact in his own knowledge, and no manner of secrecy committed to him by his client." That the reporter was right, and the court wrong, has been agreed ever since. In *Doe v. Andrews*, (*Cowp.* 845,) Lord Mansfield said, "I have known an attorney obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury." (And see *Buller's N. P.* 284; *1 Phil. Ev.* 146, 7th ed.; *1 Gilb. Ev.* 277; *2 Stark. Ev.* 398; *Roscoe's Cr. Ev.* 150; *Peake's Ev. (Norris)* 251; *Greenough v. Gaskell*, *1 Myl. & K.* 98.) In *Studdy v. Sanders*, (*2 Dowl. & Ryl.* 347,) the clerk of the solicitor was called to identify the defendants, as the persons who had put in an answer in chancery, and it appearing that his knowledge of the fact arose wholly from communications with the defendants, the evidence was rejected, and the plaintiff nonsuited. But the nonsuit was set aside. The court said, the fact offered to be proved was *not in the nature of a confidential communication between attorney and client*, because it was a fact easily cognizable to the witness and to many other persons, without any confidence on the subject being reposed in him. See *Parkins v. Hawkshaw*, (*2 Stark. R.* 239,) which seems to be the other way. But the witness was not called to speak of an *act*, but to disclose *communications* with the client.

The attorney may be called against his client, to prove a deed to which he is a subscribing witness. In *Doe v. Andrews*, (*Cowp.* 845,) Lord Mansfield said, "An attorney has no privilege to give evidence of collateral facts." In

*Robson v. Kemp*, (5 *Esp. R.* 52,) the attorney was required to testify concerning a warrant of attorney which he had subscribed as a witness. Lord Ellenborough said, the attorney was bound to disclose all that passed at the time, respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it; upon which matters he had a right to be silent. (4 *Esp. R.* 235, *S. C.*) In *Hurd v. Moring*, (1 *Car. & Payne*, 372,) the attorney was required to prove his client's hand-writing, although his knowledge of it was acquired solely from seeing him sign the bail bond; and in *Johnson v. Daverne*, (19 *John. R.* 134,) the attorney had acquired a knowledge of his client's hand-writing after the retainer, but without any confidential communication, and it was held that he was bound to testify. In *Sanford v. Remington*, (2 *Ves. jun.* 189,) the chancellor said, the witness may be called on to disclose all that did pass in his presence at the execution of the deed; so his having been sent by his client with orders to put the judgment in execution—that is an *act*; but he is not to disclose the private conversation as to the deed, with regard to what was communicated as to the reasons for making it.

In *Robson v. Kemp*, (5 *Esp. R.* 52,) the attorney was called to prove the destruction of a deed, and said, that all he knew about it had been acquired by being called in by both parties as their attorney; and Lord Ellenborough rejected the evidence. He remarked, "The act cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is privileged as well as another. He cannot be said to be privileged as to what he *hears*, but not as to what he *sees*, where the knowledge acquired as to both has been from his situation as attorney." Notwithstanding what is said about the sense of *seeing* being privileged, I think the witness must have been questioned concerning what was *said* by the client; for the judge immediately adds: "I therefore think, if the only knowledge he has, as to the destruc-

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tion of this instrument, was acquired from the confidential *communication* made to him as an attorney, that he cannot be examined to it." It may have been thought important that the witness had acted as attorney for both parties; for where an attorney is called in by one party to witness a transaction in the way of business with a third person, I cannot think that his mouth is closed either as to what he saw or what he heard. It is not in the nature of a confidential communication between an attorney and client. (See *Lessee of Devoy v. Burke*, 2 *Fox & Smith* (Irish K. B.) 191.) In *Duffin v. Smith*, (*Peake's N. P. Cas.* 108,) the defendant called the plaintiff's attorney, to prove that the consideration of the bond in suit was usurious; and he was admitted. Lord Kenyon, said: "Where any thing is *communicated* to an attorney by his client for the purpose of his defence, he ought not to divulge it; but *where he himself is, as it were, a party to the original transaction*, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person." (See 12 *Viner's Abr.* 38, *pl.* 1.)

An attorney's clerk may be called to prove that he received a particular paper from the client. (*Eicke v. Nokes*, 1 *M. & M.* 303.) And the attorney may be required to make discovery of a deed entrusted to him by his client, by answering whether there was such a deed, where it is, to whom delivered, when he last saw it, and in whose custody; but not to produce the deed, or discover its contents. (*Kington v. Gale*, 8 *Viner's Abr.* 548.) Mr. Justice Buller, in speaking of cases where the attorney may be called, says: "If the question were about a rasure in a deed or will, he might be examined to the question whether he had ever *seen* such deed or will in other plight, *for that is a fact of his own knowledge*; but he ought not to be permitted to discover any *confessions* his client may have made to him on such head. So, if an attorney were *present* when his client was sworn to an answer in chancery, upon an indictment for perjury he would be a witness to prove the fact of taking the oath, *for it is a fact in his own*



*knowledge, and no matter of secrecy committed to him by his client.*" (*Bull. N. P.* 284.) In the case at bar, the witness was questioned as to "a fact in his own knowledge;" it was "no matter of secrecy committed to him by his client;" and I can see no possible reason why he should not answer.

There is a further reason for holding the evidence admissible. The case which the defendant's counsel proposed to make out, was, that the account was stated, and a large balance acknowledged to be due the plaintiff, for the purpose of defrauding the defendants, Edwards & McKibben. Now, if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may, perhaps, be privileged; and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose, whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame, or his property, may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness. (*See the remarks of Ld. Brougham, in Greenough v. Gaskell, 1 Myln. & K. 98.*)

The third question proposed to the witness was, in substance, "*When did you first see the account stated, and was the evidence of a settlement endorsed on the account when you first saw it?*" Although the question does not necessarily imply so much, it was understood on the hearing as intended to draw from the witness an admission that he had seen the paper *in the hands of his client*, or received it *from him*, in a different state or condition from that in which it appeared on the trial. If such was the aim of the defendants in putting the question, I think the referees were right in not allowing it to be answered. We have already seen, that the attorney cannot be compelled either



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to produce or to disclose the contents of a paper which he has received from his client; and this is so, although the paper may be required as the foundation for a public prosecution. (*Rex v. Dixon*, 3 Burr. 1687. *Rex v. Smith*, 1 Phil. Ev. 142.) The principle is, that all confidential communications between attorney and client, whether written or oral, are alike privileged. If the plaintiff, at any particular time, delivered or exhibited the account to his attorney without the evidence of a settlement endorsed upon it, it was the same thing, in substance, as though he had at that time told him verbally that he had an account in that plight; and the one form of communication is, I think, as much privileged as the other.

No case which has fallen under my observation necessarily goes the length of deciding that such a question must be answered. In *Lord Say and Seal's case*, (10 Mod. 40,) it does not appear that the fact of the ante-dating of the deed, was in any form communicated to the attorney by his client. On the contrary, it may fairly be inferred from what is said, that the ante-dating of the deed was the joint work of the attorney and client; and in that point of view, the decision supports a position which has already been stated, that the attorney must answer as to any fraudulent act on the part of the client which was done in his presence. The cases to which I have already referred, to show that the attorney may be called to identify his client as the person who had sworn to an answer in chancery, to prove a deed to which the attorney is a subscribing witness, or to prove the hand-writing of the client, all stand on the ground that the knowledge of the attorney was not acquired as a secret from his client. In *Duffin v. Smith*, (*Peake's N. P. Cas.* 108,) where the plaintiff's attorney was required to testify to the usurious consideration of the bond and mortgage, the facts are very briefly stated; but it is quite clear that Lord Kenyon did not intend to depart from the general principle; for he said, "Where any thing is *communicated* to an attorney by his client, for the purpose of defence, he ought not to divulge it; but where he himself is, as it

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were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person."

In *Baker v. Arnold*, (1 Caines, 258,) the question was presented, whether the attorney could be required to answer as to what state the note was in when he received it from his client; and the reporter supposed the point was decided in favor of the admissibility of the evidence. But he was mistaken; the case went off on another question. (See the remarks upon this case in *Brandt v. Klien*, 17 John. R. 338) Although the point was not decided in *Baker v. Arnold*, it was discussed by three of the judges; and Thompson and Livingston, Js. were of opinion, that the witness should not be required to answer the question: Radcliff, J. held the contrary; and the other two judges expressed no opinion on the point. It is said in *Buller's N. P.* 284, in mentioning the cases where the attorney may be called—"If the question were about a rasure in a deed or will, he might be examined to the question, whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge." The reason assigned by Buller plainly shows, that he was speaking of a case where the attorney had acquired his knowledge of the state of the instrument, previous to his retainer, or in some other way than from his client. (See per Thompson, J. in *Baker v. Arnold*, 1 Caines, 267, 8.) Although he does not cite it, I have no doubt that Buller had in his mind the case of *Cuts v. Pickering*, (1 Vent. 197,) where, on a trial at bar, it was held, that the solicitor must answer as to what his client had told him before the retainer concerning a rasure in a will. In *Brown v. Payson*, (6 N. Hamp. R. 443,) the precise point was adjudged, that the attorney cannot be required to testify concerning the state of a written instrument, at the time it was received from his client, for the purpose of commencing an action upon it. To that doctrine I fully assent. I am unable to perceive any solid distinction between the oral statement of a fact to counsel, and a communication of the same fact, by delivering to him a deed or other written instrument.

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The referees were right in not permitting the last question to be answered: but as they were wrong in relation to the first two questions, there must be a rehearing.

By Jrt set aside.

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HOWARD vs. COOPER.

C. borrowed money of H., saying to him at the time, that if a contemplated contract for barrels between C. and H.'s firm was concluded, he would credit the firm with the money; and H. entered the money as a payment to C. on the firm books. The contract was concluded, and the barrels delivered under it to the firm; after which H. and R. his partner, entered into bonds with C., submitting to arbitrators *all and all manner of action, causes of action and demands*, pursuant to which an award was made; but on the hearing before the arbitrators it was verbally agreed, that *the barrel contract, and any question arising out of it*, should be withdrawn from the arbitration; and accordingly that was not passed upon. C. subsequently sued H. & R. for the barrels delivered under the contract, and upon the trial, C. refused to allow the money got of H.; whereupon H. charged it back to himself on the firm books, and now brought his action to recover it. **Held**, that the action could not be sustained.

If H. had originally the right to apply the money, when and as he pleased, then, under the circumstances, his only remedy was to have it used defensively, in the action of C. against the firm; and whether he had done so or not, and whether it had there been allowed or disallowed, it was barred by that suit.

A sum of money advanced or applied as payment on a subsisting demand, is not recoverable by action against the payee. It can only be made available by way of answer to an action by the payee.

If the money in question passed as a naked loan, then, not being connected with the *barrel contract, nor any question arising out of it*, it was not one of the matters attempted to be withdrawn from the arbitrators, and so was barred by the award.

And for the same reason, the award would be a bar, if C. had the option to apply the money or not on the barrel contract, and had made no election prior to the arbitration.

Where a submission to arbitrators is under seal, a claim within it cannot be withdrawn, *by parol*, at the hearing, so as to prevent the award operating as a bar to a subsequent suit respecting such claim.

**ASSUMPSIT** for money lent, tried at the Albany circuit, December 13th, 1839, before CUSHMAN, C. Judge.

After the general issue, *the defendant pleaded a submission*

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sion of the matters in controversy to, and an award by, arbitrators. The submission was by the plaintiff and *Ryckman*, on the one side, and the defendant on the other, by bonds conditioned to abide the award, &c. (in the usual form,) "of and concerning all and all manner of action and actions, cause and causes of action, and demands whatsoever," &c. The bonds bore date December 25th, 1833, and the award (which was under seal) was made March 22d, 1834. This, among other things, directed that the parties should execute mutual releases of all accounts, debts, dues, claims, causes of action and demands, up to January 15th, 1834.

*Replication*, that while the parties were before the arbitrators upon the hearing of the matters submitted, the plaintiff, at the request of the defendant, and with the approbation of the arbitrators, withdrew the claim mentioned in the declaration from the arbitrament; in consideration whereof the defendant agreed then and there that the same should remain the subject of further settlement, notwithstanding the submission.

*Rejoinder*, denying any withdrawal as alleged.

The proof was, that the defendant borrowed \$400 of the plaintiff, in July, 1832, telling the plaintiff that, if a certain contemplated contract with the plaintiff's firm (Howard & Ryckman) to purchase barrels of the defendant should be concluded, he (defendant) would credit the firm with the \$400. It was entered by the plaintiff in the firm books, as a payment made to the defendant; but on his refusing to allow it at the hearing before referees, in a suit by the present defendant against the firm, tried in 1835, hereinafter mentioned, it was charged back by the plaintiff to himself on the books of the firm.

The barrel contract was concluded in August, 1832; the barrels delivered accordingly by the defendant to the firm, and various payments made by the firm on that contract.

The plaintiff then proved, that on the hearing before the arbitrators in 1834, pursuant to the submission set forth in the pleadings, it was agreed between the parties, that the barrel contract, and any question arising out of it, should

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be withdrawn, and not submitted ; and that, accordingly, it was not passed upon.

An objection was made that the matter could not be thus withdrawn by parol from the sealed submission. But the judge overruled the objection.

A motion was made, on the plaintiff resting, for a non-suit, upon the ground that the withdrawal of the barrel contract and the questions arising out of it, from the consideration of the arbitrators, did not withdraw the claim for the \$400 ; inasmuch as that claim was not included as an integral part of that contract. The motion, however, was overruled.

It further appeared, that in 1835, Cooper, (the present defendant,) had sued Ryckman and the present plaintiff, (Howard,) in the Albany mayor's court, for the barrels sold and delivered on the barrel contract. That the cause was referred, and heard in the same year before referees ; Howard & Ryckman then insisting on payment, and putting in evidence various receipts. The question was there raised, whether the \$400 now in controversy should be appropriated as part payment. Howard offered to set off the \$400, and asked Cooper to admit it ; but the latter objected, alleging that he remembered nothing of the claim. "If you can prove I had it," he said, "and satisfy me of it, I will allow it, though a private demand. I have no recollection of it," &c. Howard spoke of its being connected with the barrel contract : and his counsel said to Cooper in his (Howard's) presence—"He did let you have it ; for I have seen a credit for that sum on one of the bills you have rendered to Howard & Ryckman." Cooper replied, "Produce that bill, and I will allow it." No such bill or account was produced ; and Howard then observed, "If you refuse to allow it, I must reserve it as an individual demand, and sue you for it."

The judge charged the jury, that if, from the testimony, they believed that the plaintiff had loaned the \$400 to the defendant, and that the latter had a right to apply the \$400 on the barrel contract or not, at his option, then, although

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the bonds of submission were broad enough to embrace the \$400, yet the withdrawal of the barrel contract was a withdrawal of the \$400, as necessarily connected with the barrel contract; and the plaintiff had no cause of action for the same till the defendant's refusal to allow it. That, in the mean time, the plaintiff's right of action was suspended and imperfect; therefore the submission and award did not preclude the plaintiff's right to recover. But if the jury came to the conclusion that the defendant had not the option to apply the \$400, as aforesaid, but that the plaintiff had the right to make the application when and as he pleased, or that the \$400 had been applied, then they should find for the defendant.

The defendant's counsel requested the judge to charge the jury, that, if they believed the plaintiff treated the \$400 as an individual demand against the defendant, then it was covered by the submission. But if they believed that the \$400 constituted a credit, applicable on the barrel contract, or that the defendant had at any time given a credit for that sum to Howard & Ryckman, on account of the barrel contract, on any bill or account rendered them, the plaintiff could not recover.

The judge declined so to charge, or in any manner to alter or modify his charge as before given, except that if the jury found the agreement to have been, that the defendant had not the right to apply the \$400 on the barrel contract, then their verdict should be for the defendant.

Exceptions were taken to the above decisions and charge; and the jury gave a verdict for the plaintiff. The defendant now moves for a new trial on a bill of exceptions.

*S. Stevens*, for the defendant.

*J. Holmes*, for the plaintiff.

*By the Court*, COWEN, J. The judge charged correctly, that if Howard had the right to apply the \$400, when and as he pleased, or if it had in fact been applied, then the plaintiff could not recover. This is not denied. He was

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bound to introduce the credit defensively before the referees, and whether he had done so or not, and whether it had then been allowed or disallowed, an action for the sum was barred by the suit and proceedings in the mayor's court. Indeed, independently of that, a sum of money advanced or applied as payment on a subsisting demand, is not recoverable by the payor in an action against the payee. The only way in which it can be made available is, by way of answer to an action by the payee.

On the other hand, if the money had passed by a naked loan, it would have been the subject of an action originally, but was barred by the submission and award. Not being at all connected with the barrel contract, it was not withdrawn from the consideration of the arbitrators; for the only matter attempted to be withdrawn, was, the barrel contract and *any question arising out of it*. So far, most clearly, the plaintiff in avoiding Scylla, is necessarily drawn into Charybdis.

The jury have, however, found the middle ground—that the defendant had an option either to treat the advance as an independent loan, or to apply it; and finally, when he came to the reference, he refused to do the latter. In the mean time, did the \$400 make a part of the barrel contract, or was it any way connected with it? Does the present action for the money raise any question which would arise out of the barrel contract; or any point of litigation in regard to that contract? The learned judge thought the nature of the claim for the \$400 was suspended between the character of a loan and a payment, from the time of the advance till 1835, when the defendant refused to apply it; that up to that time, it stood on the option of the defendant, whether it should be applied as a payment on the barrel contract, or treated as an independent loan. The loan was clearly independent in the first instance. It then had nothing to do with the barrel contract; and the only way in which the defendant could connect it, was by crediting it on the barrel account. That he did not do. He might have connected it, but did not; and being in no wise connected with the contract at the time of the arbi-

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tration, how can it be said to furnish any question arising out of such contract? The contract of loan was one thing; the contract to deliver barrels another; and the only option which could bring them into one, was never exerted. Till exerted, the contract of loan continued such; and although suspended, it seems to me an action would have lain for money lent, at any time before being actually applied as a payment. It was but borrowing money, with leave to set it off against a future debt to become due from the lender to the borrower. But it was never actually set off. A question on the previous debt can no more be said to arise out of a suit or arbitration concerning the latter, than if there had been no agreement, but the set-off had been left upon the legal right. Whether it should be set off, would in either case be optional with the borrower.

It appears to me, therefore, that the judge erred in charging that an option to set off, so connected the loan with the barrel contract, that the withdrawal of the latter took the former along with it; and that therefore he should have directed a verdict for the defendant, on the ground that, admitting the barrel contract was effectually withdrawn, still the loan was left for the consideration of the arbitrators, and so this action barred by the award.

Another objection taken is, that admitting it to have been connected with the barrel contract, yet even the latter could not be withdrawn by parol, but only by revocation under seal, on the maxim *eo ligamine quo ligitur*. No doubt the maxim entirely applies to a sealed submission, as well as to a sealed contract. It is out of the power of both parties to alter the legal effect of the one or the other, without seal. (*Creig v. Talbot*, 2 Barn. & Cress. 179, *per Holroyd, J.* and the cases cited by him; and *vid. Allen v. Jaquish*, 21 Wend. 628, and the cases there cited.) The submission must therefore be taken to have stood the same as if the parties had said nothing of the barrel contract; and the award would, in that view, be a bar

New trial granted.



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The People *v.* The Supervisors of Dutchess.

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**THE PEOPLE, *ex rel.* The Commissioners of Highways of Poughkeepsie and Fishkill, *vs.* THE BOARD OF SUPERVISORS OF THE COUNTY OF DUTCHESS.**

The provision in the act for building the bridge across the mouth of *Wappinger's creek* in the county of Dutchess, (commonly called Drake's bridge,) that *when completed, &c. it should be a public bridge, and under the control and direction of the supervisors of the county*, was intended to relieve the towns in which it was located, from the burthen of repairing it, and to impose that burthen on the county. Hence *held*, in this case, that a resolution of the board of supervisors, directing a sum to be levied and raised for repairing the bridge in question, on the towns of Poughkeepsie and Fishkill, was erroneous.

The bridge being a charge on the county, and not on the towns, the supervisors might lawfully impose on the former, the raising of a sum sufficient to repair it, notwithstanding they had, in the same year, caused \$1000 to be levied and raised, pursuant to 1 R. S. 524, § 119, 120, relating to bridges which are a charge upon the towns: especially since the act of 1838 to enlarge the powers of boards of supervisors.

The third section of the act of 1838, requiring all persons intending to apply for the imposition of a tax to give notice, &c., does not, *it seems*, restrain the board from acting on their own motion, in raising money for the necessary repair of county bridges. Even had the towns, in this case, been liable for the repair of the bridge, inasmuch as the supervisors thereof had made no application pursuant to 1 R. S. 502, § 4, for a tax on *their towns*, but only on *the county*, the board of supervisors, *it seems*, would have had no power to act. Clearly not, under the act of 1838; as there had been no such vote of the towns as that act requires.

Although there were two resolutions of the board of supervisors in this case, *viz.* *first*, that a specified sum be raised, &c. and *second*, that it be raised by the towns in question; yet *held*, that they constituted only one measure; and the relators could not, while resisting the second, compel the board to execute the first, by way of county charge.

And the alternative mandamus having, in effect, required this, on demurrer to the return, judgment was given for the defendants; but without costs.

As a general rule, the peremptory writ of mandamus must pursue the alternative one, in respect to the thing required to be done.

Should the board of supervisors omit, hereafter, to adopt the proper measures for repairing the bridge, at the expense of the county; *quere*, whether the remedy would be by *mandamus* or by *indictment* against the county.

DEMURRER to the return to an alternative *mandamus*. The facts are sufficiently stated in the opinion of the court which was delivered by

BRONSON, J. By the act of April 6, 1808, (*Private Laws of 1808*, p. 170,) John Drake, jun. and Samuel Bogardus

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were authorized to erect a bridge, at their own expense, across the mouth of Wappinger's creek, in the county of Dutchess. The bridge was to be finished by the first of June, 1809; and the third section of the act declared, that the bridge, when completed, should be a *public bridge*, and should be under the *control and direction of the supervisors of the county*. But it was provided by the fifth section, that it should not become a *public bridge*, until the court of common pleas of the county should agree to receive it *as such*. The bridge was built in pursuance of the act, and on the 27th June, 1826, the court of common pleas, by a rule entered in open court, agreed to receive the same as a public bridge.

Wappinger's creek, over which the bridge was built, is the boundary between the towns of Poughkeepsie and Fishkill. (3 R. S. 25, 26.) At an adjourned meeting of the board of supervisors of Dutchess, held on the 13th December, 1839, the commissioners of highways of the towns of Fishkill and Poughkeepsie, applied to the board to take the charge and control of the bridge, (which is commonly called *Drake's bridge*,) and cause the same to be repaired and maintained at the expense of the *county*. The board thereupon passed two resolutions: *first*, that the sum of \$200 be raised for the repair and support of the bridge; and *second*, that the money be raised by, and apportioned between *the towns of Fishkill and Poughkeepsie*. The relators thereupon obtained an alternative mandamus, calling on the board of supervisors to vacate the *second* resolution, which required the money to be raised by the *two towns*, and directing the board to cause the said sum of \$200 for the repair and support of the bridge, to be raised by and apportioned among *all the towns of the county as a county charge*.

At the annual meeting of the board in November, 1839, preceding the adjourned meeting at which the foregoing resolutions were adopted, the board had resolved to raise \$1000 on the county, for the relief of such towns as were unreasonably burthened with bridges; and had resolved to divide the same among eleven of the towns of the county

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of which the towns of Fishkill and Poughkeepsie were two. (See 1 R. S. 524, § 119, 120.) They had also directed the sum of \$250 to be levied upon each of those towns for roads and bridges, pursuant to 1 R. S. 502, § 4.

The first inquiry is, how much was intended by the provision that the bridge, after it should become public, should be under *the control and direction of the supervisors of the county*? It seems from the preamble and other parts of the statute, that there had before been a bridge at the same place, which had recently been carried away; that Drake owned the land on both sides of the creek; and that the act was passed to authorize him and Bogardus to build another bridge, making it more secure against ice and floods, by sinking a "block" or pier in the creek. The bridge was to be constructed with a draw, so as not to interrupt the navigation of the creek with masted vessels. It was to be an "open highway," and to be "freely used without toll or reward." Drake and Bogardus were at all times, for eight years after the bridge should be completed, to keep persons to attend and open the draw, during the season of navigation, for the passage of vessels; and the bridge was not to become public, until Drake and Bogardus should cause the road, leading from the bridge to the public ferry across the Hudson river, near Drake's store, to be laid out and recorded as a public highway, without any expense to the town or towns through which it passed. It would seem that both the road and bridge were at that time private property, which Drake and his associate had found it for their interest to open and construct; that they were willing to rebuild the bridge in a more substantial and useful manner, and to incur the expense of having the road laid out and established according to law, and to take upon themselves the burden of attending the draw eight years, in the expectation that the road and bridge would afterwards become public property.

In providing that this should, in a certain event, become public, instead of private property, the legislature went, I think, beyond relieving Drake and Bogardus from the burden

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which would otherwise have rested on them, and transferred it to the *county*. Had the act stopped with declaring that this should become a "public bridge," the case would have been left to the operation of the general law then in force, and the support of the bridge would probably have fallen upon the towns of Fishkill and Poughkeepsie; unless the supervisors had consented to render them some aid. (1 *Web.* 588, § 1, and *p.* 599, § 26.) But after declaring how and on what terms it should become a public bridge, the statute further provides, that thereafter, the bridge "shall be under the control and direction of the supervisors of the said county of Dutchess." Although more apt words might have been used for that purpose, I am unable to understand this language as meaning less than that the bridge should be repaired and maintained by the county. I cannot see why the "control and direction" of the bridge should be given to the supervisors of the county; if it was intended that this, like other bridges, should be repaired and upheld by the towns.

If the repair of the bridge was a legal charge upon the county, it follows, of course, that the board erred in the second resolution, which directed the sum of \$200 for the repair of the bridge, to be raised by, and apportioned between, the towns of Fishkill and Poughkeepsie.

The supervisors say, they had no power to raise money for the repair of this bridge—especially after they had directed the raising and distribution of the \$1000, provided for by 1 *R. S.* 524, § 119, 120. In that, I think, they are mistaken. The statute to which they refer is not the one which governs this question. That relates to bridges which are a charge upon the *towns*. This bridge is a charge on the *county*; and the supervisors have ample power to raise money to defray all county charges. (1 *R. S.* 386, § 5.) If there could be any doubt upon this statute, the case is provided for by the act of 1838, "to enlarge the powers of boards of supervisors." (*Statutes of 1838*, *p.* 314.) By the first section, the board has power, among other things, "to cause to be levied, collected and

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paid to the treasurer of the county, such sum of money as may be necessary to construct and repair bridges therein; and to prescribe upon what plan, and in what manner, the moneys so to be raised shall be expended." The provision contained in the third section, that persons intending to apply for the imposing of a tax pursuant to the first section, shall give notice, &c., cannot restrain the board of supervisors from acting on their own motion, in raising money for the necessary repair of a bridge which is a charge on the county.

The relators are right, so far as they complain of the resolution which makes the \$200, directed to be raised, a charge on the towns which they represent. The charge should have been on the county. But there is also another reason why the defendants are wrong. If the two towns had been liable for the repair of the bridge, the board of supervisors had no control over the matter, except on the application of the supervisors of the two towns. (1 R. S. 592, § 4.) The relators did not apply for a tax on their towns, but for a tax on the county. And besides, the tax authorized by the statute just referred to, had been ordered at the annual meeting in November preceding the time of passing the two resolutions. The board had no authority under the act of 1838, because there had been no such vote of the towns as that act requires. (*Statutes of 1838, p. 314, § 1, sub. 5.*)

Although right in this, the relators are wrong in the other branch of their case. They attempt to separate the first and second resolutions passed by the supervisors; and they treat the former as though it were a resolve to raise \$200 on the *county*, for the repair of the bridge. Although there were two resolutions, only one measure was agreed on by the board, and that was to raise \$200 on the two towns. By treating the resolutions as independent propositions, the board is made to speak a language directly the reverse of its intention. The alternative writ does not call on the board, in general terms, to cause the bridge to be repaired as a county charge; but, in effect, it requires the board to

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~~execute~~ the last resolution, and raise the particular sum of money mentioned in it. This the relators had no right to ask. The command of this part of the writ should not have gone beyond putting the defendants in motion. After requiring them to repair, as a county charge, it should have been left to them to determine how much money should be raised for that purpose.

As the writ demands too much, I think there should be judgment for the defendants. We cannot very well separate, and give judgment for the relators as to a part of the requirement of the writ, and for the defendants as to the residue. As to the thing required to be done, the peremptory writ, when awarded, should follow the alternative mandamus. I do not think it important to inquire whether there are any exceptions to this rule. The parties on both sides are public officers, who undoubtedly intend to do their duty. They have come here not so much for victory, as to settle an honest difference of opinion as to where the burden lies of repairing this bridge. On learning our opinion, it may be presumed that the board of supervisors, without any coercive measures, will retrace its steps as to charging this burden upon the two towns, and take the proper measures for repairing the bridge at the expense of the county. If, however, they should not do so, there will be a remedy; but whether by *mandamus*, or by indictment against the county, we need not now consider.

This is a very proper case for exercising the discretion which has been vested in us of denying costs.

Judgment for defendants but without costs.

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Lee v. Clark.

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**LEE and others vs. CLARK, impleaded with Parmenter & Green.**

P., together with C. & G., his sureties, gave a bond to the plaintiffs, which, after reciting a written contract of P. and the plaintiffs with B., and that the plaintiffs and P. jointly owed B. a sum of money thereon, was conditioned that P. should pay that money, or save the plaintiffs harmless; &c. Afterward, B. sued P. and the plaintiffs for the money, who put the cause at issue, suffered an inquest to be taken against them at the circuit; and then the plaintiffs, before judgment, settled with B., giving their negotiable note for the amount of the verdict and B.'s taxable costs, which he received in full satisfaction. *Held*, that P., not only, but the sureties, were liable on the bond for the amount of the recovery and B.'s taxable costs.

*Held*, also, that the verdict, proved by the circuit roll and clerk's minutes of trial, was admissible against the sureties, as well as P., to show the amount of damages; and this, though the sureties had no notice of that suit.

Where parties, whether principal or sureties, stipulate to pay a third person, or indemnify the debtor, a verdict against the latter, by reason of their default, is at least *prima facie*, not to say conclusive evidence against them, without their having been notified of the former suit.

The plaintiffs' negotiable note, given and accepted in full satisfaction of B.'s recovery and costs, was equivalent to a cash payment by them.

So, *semble*, had the note not been negotiable in its character.

The recital in the bond of the contract with B. as having been *executed by him*, was primary, and, *it seems*, conclusive evidence against the obligees, of B.'s execution of it; thus superseding the necessity of proving that fact, in an action against P. and his sureties on the bond; and this, though the contract, when produced, purported to have been signed by another as attorney for B.

DEBT on bond, tried at the Rensselaer circuit, March 16, 1840, before CUSHMAN, C. Judge. The bond bore date April 7th, 1838, and was in the penalty of \$1000, with a condition reciting, that the plaintiffs had, on the day of the date, assigned to Parmenter their interest in a contract with J. S. Beekman, to purchase lot 409 in the Paradox tract, for \$337, on which agreement a certain sum was due from the plaintiffs and said Parmenter jointly; the agreement being executed by the said Beekman to the said plaintiffs and Parmenter, and dated the 18th September, 1834. The condition of the bond then provided, that Parmenter should pay the

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sum remaining due to Beekman, or save the plaintiffs harmless from the said agreement. Clark and Green were sureties for Parmenter in the bond; but *Clark* alone defended this suit.

After proof of the bond, the plaintiffs' counsel offered in evidence the circuit roll and clerk's minutes of trial, showing a verdict, on inquest taken at the Rensselaer circuit, March 19th, 1839, in a suit by Beekman against the plaintiffs and Parmenter, on a certain sealed instrument afterwards given in evidence. The damages in that suit were assessed at \$728,57. The evidence was objected to as not admissible or competent to show the amount of damages, but was received.

The plaintiffs' counsel then produced and offered an agreement, corresponding with that recited in the bond, signed and sealed by the plaintiffs and Parmenter; but the form of signature for Beekman was, "John S. Beekman, by his attorney, George Webster, [L. s.]" Proof of its execution by the now plaintiffs and Parmenter was given, and the signature of Webster was proved, but his authority to execute was not shown; and for want of this, the defendants' counsel objected, but the objection was overruled.

The plaintiffs' counsel then offered in evidence a taxed bill of Beekman's costs, in the suit against them and Parmenter. The testimony was objected to as inadmissible against *Clark*, but received.

It appeared that the now plaintiffs had settled the verdict in favor of Beekman, and the said costs, by giving their negotiable promissory note to Beekman's attorney, who, with the assent of Beekman, received the same in full satisfaction; and this was done before judgment. In that suit, no proof of the execution of the agreement by Beekman was given, except evidence of the handwriting of Webster.

The defendants' counsel moved for a nonsuit, on the following grounds: 1. That there was no proof of the plaintiffs having paid any money on the Beekman contract; 2. That there was no proof that the defendant Clark had



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notice of the suit by Beekman ; 3. That Clark, being a surety was merely bound to save the plaintiffs harmless ; or, at most, was liable for nominal damages only, till something was actually paid ; 4. That Clark had no notice of the former suit, nor had the plaintiffs defended it, but suffered a verdict to pass on insufficient proof.

The motion was denied—the judge deciding that the plaintiffs were entitled to their verdict for the said damages recovered, and Beekman's costs. Verdict accordingly.

The defendants' counsel having excepted to the above decisions, respectively, now moved for a new trial on a bill of exceptions.

*S. Stevens*, for plaintiffs.

*J. Pearson*, for defendants.

*By the Court*, COWEN, J. There can be no doubt that the proof of the verdict was admissible, to show the amount of damages. The suit was stopped at that stage by the now plaintiffs giving their note for the amount, which was taken in full satisfaction and discharge. A negotiable note so given and accepted, is equivalent to the payment of cash. So it would now probably be holden of a note not negotiable ; but no objection was taken on this distinction.

The defendants were estopped to deny that Beekman executed the agreement by Webster, his attorney. The agreement was definitely recited in the bond as having been executed by him ; and such a recital is primary proof of the verity of the agreement as against the defendants. It also shows that the now plaintiffs properly suffered the verdict in the former suit to pass against them.

No notice of the former suit was necessary. The condition of the bond was to pay, or save the plaintiffs harmless. Where parties, principals or sureties, stipulate for an indemnity in this form, a verdict recovered by reason of their default, is at least *prima facie*, not to say conclusive evidence against them, though they had no notice. (*Duffield*

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Rosenstein v. Sammons.

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v. *Scott*, 3 T. R. 374.) Evidence respecting the suit was not necessary, except for the purpose of recovering the costs. The default of the defendants in not making payment, and actual payment by the plaintiffs, were otherwise proved.

I do not go over the cases which sustain the views we take; they were cited in the course of the argument. *Duffield v. Scott* is full to the merits of the plaintiffs' claim; and the technical questions are of common occurrence, and perfectly well settled.

New trial denied.

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ROSENSTEIN and others vs. SAMMONS, sheriff, &c.

*Held*, that a suit may be maintained by the sheriff upon a bail bond taken by him pursuant to the revised statutes, on an arrest, and nominal damages, at least, recovered, even though special bail in the original action was put in before the sheriff sued; the defendant being in default for not appearing according to the condition of the bond, and the sheriff having been subjected to the costs of an attachment for not bringing in the body: and this, without the sheriff having actually paid the costs, or put in bail in the original suit, or been subjected to any further liability.

ERROR from the Montgomery common pleas. The action below was debt on a bail bond given to the plaintiff below, sheriff, &c. upon the arrest of Rosenstein in virtue of a *capias ad respondendum* issued out of said court, returnable in September term, 1839. The bond was in the form required by the revised statutes. Rosenstein did not appear in the original action within the time required by the bond; but in December term after, he caused his appearance to be entered, and notice thereof given. Before this was done, however, proceedings had been taken against the sheriff for not bringing in the body, and an attachment awarded, the costs upon which he had promised to pay. He had not put in special bail, nor actually paid any thing in the original suit; nor had any proceedings been taken to subject him

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to liability, beyond those above mentioned. This suit was not commenced until after Rosenstein had put in special bail, &c. These facts all appearing before the plaintiff below rested his case, the defendants below moved for a nonsuit, on the grounds—1. That the action would not lie after an appearance in the original suit; and 2. That the plaintiff below had not shown himself actually damnified by the payment of any thing in that suit. The court overruled the motion, to which the defendants below excepted; and a verdict passed against them for \$500 debt, and damages \$11,46, being the amount of the costs for obtaining the attachment. After judgment, the defendants below sued out a writ of error.

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*N. Hill, jun.* for the plaintiffs in error, relied principally upon *Matthison v. Forbus, &c.* (19 *John. R.* 292.)

*J. A. Spencer, contra.*

*By the Court, BRONSON, J.* The case of *Matthison v. Forbus, &c.* (19 *John. R.* 292,) is not applicable to cases arising since 1830. (2 *R. S.* 349, § 16.) The defendant in the original action not only neglected to appear, by putting in bail with in the proper time, but the sheriff was ruled and an attachment against him had been ordered, before bail was put in; the costs of which proceeding the sheriff had become liable for and had promised to pay. It is impossible to deny that there had been a breach of the condition of the bond, for which the sheriff was entitled to recover nominal damages, at least; and that is all that was involved in denying the motion for a nonsuit. There is no exception upon any other point.

Judgment affirmed.

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Whitney v. Crim.

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## WHITNEY vs. CRIM.

Much greater latitude is allowed in pleadings before justices of the peace, than in courts of record; especially in cases where the objection was not taken at the proper time.

Independently of the case of *Lovett v. Pell*, (22 *Wendell*, 369,) the misjoinder of counts in a justice's court, is not a fatal defect, no objection being interposed until after verdict.

Where W., a party to a suit before a justice of the peace, after the jury had retired to deliberate, told the justice in the presence of the other party, that the jury wished to see him, whereupon he entered the jury room alone, but held no conversation with them respecting the merits of the case; *held*, that what W. said to the justice, amounted to little, if any thing, short of an express consent; and the judgment having been against W., the court refused to interfere with it.

The case of *Taylor v. Betsford*, (13 *John. R.* 487,) is an extreme one, and the court will not go beyond it.

Where, after a jury had retired to deliberate, they came into court, and requested the justice to read over the testimony of a certain witness, which he did, but owing to his not having taken down all the witness said, a part of it, only remotely relating to the merits, was not mentioned to the jury; *held*, that neither party having called the justice's attention to the omission at the time, it was not a ground for reversing the judgment, especially as there was no reason to suppose that the omission was intentional.

There being *some* evidence to sustain the finding of a jury in a justice's court, on a question of fact, the court cannot interfere with it, though they believe the jury erred.

ON error from the Herkimer C. P. Crim sued Whitney before a justice of the peace, and declared against him for a *breach of warranty* of a horse, which he had of Whitney, and also for *fraud* in the purchase. Whitney pleaded the general issue; and the cause was tried by a jury. There was *some* evidence given tending to show that, upon the facts, Crim ought to recover, though the preponderance was in favor of Whitney. After the testimony was closed, and the jury had retired to deliberate, Whitney, the defendant, *told the justice that the jury wished to see him*; whereupon both parties being present, and neither objecting, he entered the jury room alone. While in there, the jury, as the return stated, wanted to be discharged because they could not agree; but this the justice refused, telling them they

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must make a further effort. Some of the jury then said there was a portion of the testimony they did not understand alike, and wished it read over to them. The justice thereupon left the jury room, and notified the parties of the request, to which Crim replied, that the jury must come into court. The jury then came in, and repeated their request as to reading the testimony, specifying that of one Getman, a witness for Whitney, as the part about which they differed. The justice then read Getman's testimony from his minutes; but having omitted to take down a part of the witness' statement, it was not mentioned with the rest to the jury. The part omitted was, however, only very slightly material, if at all. Neither party called the justice's attention to it at the time; nor was there any thing in the circumstances tending to show that the justice intentionally suppressed it. The jury, after some further deliberation, rendered a verdict in favor of Crim for \$20 damages, on which the justice rendered judgment. The common pleas of Herkimer, on certiorari, affirmed the judgment; and Whitney sued out a writ of error.

*G. B. Judd*, for the plaintiff in error.

*E. Graves*, for the defendant in error.

*By the Court*, BRONSON, J. Independent of the case of *Lovett v. Pell*, (22 *Wendell*, 369,) which I feel unwilling to follow as a precedent, the misjoinder of counts in a justice's court will not be a fatal defect after the verdict. Much greater latitude is allowed in pleadings before justices, than in courts of record—especially in cases where the objection is not taken at the proper time.

What Whitney, the defendant in the court below, said to the justice, respecting the wish of the jury to see him, amounted to little, if any thing, short of an express consent that the justice should go into the jury room, and he ought not now to complain of that act. *Taylor v. Betsford*, (13 *John. R.* 487,) is an extreme case, and we ought

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not to go beyond it. This case is distinguishable from that, and we think the defendant's objection should not prevail.

The justice read the testimony of Getman, on the request of the jury, as he had it on his minutes. There is no ground for alleging that he *intentionally* left out a part of it; and the defendant, though present, did not call the attention of the justice to the fact that the evidence, as read, was not complete. I think the judgment should not be reversed merely because the justice had taken, and consequently read, an imperfect statement of the testimony—especially where there is no ground for saying a wrong was intended, and when the defendant did not attempt to correct the mistake at the proper time.

On the merits, there is no reason for saying that the jury erred in finding a verdict for the plaintiff; but it is a case where there was some evidence to support the verdict, and we cannot, therefore, interfere upon *certiorari*. The decision of the jury is final. (15 *Wendell*, 490. 18 *id.* 141.)

Judgment affirmed.

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RATCLIFF vs. WALES.

In an action for *crim. con.* with the plaintiff's wife, *held*, that after a divorce *a vinculo matrimonii*, she was a competent witness for the husband to prove the charge laid.

But a wife is generally incompetent, even after divorce, to testify *against* the husband, as to facts occurring during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character.

Otherwise, *semble*, as to facts occurring after divorce.

In cases of bastardy involving the adultery of the wife, she is incompetent to prove non access of her husband; but from necessity she is admitted to prove the criminal intercourse.

ACTION for *criminal conversation* with the plaintiff's wife, tried at the Sullivan circuit, in June, 1838, before RUGGLES, C. Judge. The plaintiff, after showing a divorce *a vinculo matrimonii*, called his former wife to prove the adultery with the defendant, for which the ac-

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*Ratcliff v. Wales.*

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tion was brought. The defendant objected that she was in competent to prove any fact which took place while she was the plaintiff's wife. The judge<sup>1</sup> overruled the objection, and the defendant excepted. The wife was sworn and proved the adultery, and the plaintiff had a verdict. The defendant moves for a new trial on a bill of exceptions.

*J. A. Spencer*, for defendant.

*H. G. Wisner*, for plaintiff.

*By the Court*, BRONSON, J. For the purpose of promoting a perfect union of interests, and securing mutual confidence between husband and wife, the courts have generally refused to admit the wife, as a witness against the husband, even after the marriage contract was at an end, when she was called to speak of any matter which happened during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character. In *Monroe v. Twisleton*, (*Peake's Ev. (Norris) Append.* 29, also now reported in *Peake's Add. Cas.* 219,) the action was assumpsit, and Mrs. Sandon was called to prove the defendant's promise; but it appearing that she was the wife of the defendant at the time the contract was made, she was rejected, although she had since been divorced by act of parliament. Lord Alvanley said, to prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else which happened during coverture. She was at that time bound to secrecy; what she did might be in consequence of the trust and confidence reposed in her by her husband, and miserable indeed would the condition of a husband be, if when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice. He added, it never shall be endured that the confidence which the law has created while the parties remained in the most in-

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intimate of all relations, shall be broken, whenever by the misconduct of one party, that relation has been dissolved. In *Dolcer, executor, v. Hasler*, (*Ryan & M.* 198,) the widow of the testator was called by the defendant to prove facts going to defeat the action, and her evidence was rejected on the authority of *Monroe v. Twiselton*. Best, Ch. J., said he was satisfied with the propriety of that decision, and thought the happiness of the marriage state required that the confidence between man and wife should be kept forever inviolable. In another nisi prius case tried the same year, before Abbot, Ch. J., and involving the same principle, the widow was admitted. (*Beveridge v. Minter*, 1 *Car. & Payne*, 364.) The case of *Monroe v. Twiselton*, seems not to have been mentioned, and the chief justice put the admission of the witness on the ground that she appeared against her own interest. (See *Aveson v. Lord Kinnaird*, 6 *East*, 188, and 192, 193, remarks of Lord Ellenborough upon the case of *Monroe v. Twiselton*.) In *State v. I. N. B.*, (1 *Tyler's (Vt.) R.* 36,) the wife who had been divorced *a vinculo matrimonii*, was admitted as a witness to prove a forgery committed by the husband during the coverture. But that case was expressly overruled by the same court, in *State v. Phelps*, (2 *Tyler's R.* 374.)

In the case at bar, the witness was not called *against* her former husband, nor was she asked to betray any trust or confidence which he had reposed in her during the coverture. The fact which she was offered to prove, did not even come to her knowledge in consequence of the marriage relation. And although she was called by the husband, yet as the marriage had been dissolved, she had no interest to speak in his favor. I see no principle on which the testimony could have been rejected.

In bastardy cases, where the mother is a married woman, it has been uniformly held, that the wife was not a competent witness to prove the non-access of the husband; but *from the necessity of the thing*, she has been constantly admitted to prove the criminal intercourse by which the child was begotten. (*The King v. Reading*, *Cas. Temp. Hardw.*



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Glover v. Tuck.

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73. *The King v. Inhabitants of Bedell*, Andr. 8. *The King v. Luffe*, 8 East, 193. *The King v. Inhabitants of Kea*, 11 *id.* 132. See also *Goodright v. Moss*, Cowp. 594; *Canton v. Bentley*, 11 Mass. R. 441.) If the wife was properly admitted, in these cases, to prove her criminal intercourse with the defendant, and that too, when called without the consent of the husband, I do not see how she could properly be rejected here, where she was called to prove the same fact, and with the assent of the husband.

New trial denied.

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GLOVER vs. TUCK, EWEN, T. B. BUNKER and C. BUNKER

Covenant by the defendants to honor the plaintiff's drafts *on them*, to a given amount, and authorizing him, with the funds *thus raised*, to purchase a steam engine, &c. to be used in a common enterprise, they moreover to defray his *necessary expenses* incurred in preparing for, and prosecuting the enterprise: Breach, that the defendants did not honor &c. a draft drawn by the plaintiffs, with the consent of the defendants, *on one* of them, who accepted it: *Held*, not a sufficient breach—the defendants being only bound to honor drafts when drawn *on all*.

*Held*, also, that a breach alleging a refusal to provide funds after request, &c. for the purpose of a steam engine, was bad; there being no covenant to provide funds for that purpose independently of the drafts.

But a breach was held well assigned, which alleged a refusal, after request, &c. to defray expenses of the plaintiff *necessarily incurred*, the declaration showing for what the expenses were incurred, and thus, that they were *necessary expenses* within the covenant.

DEMURRER to declaration. The action was covenant, on articles executed by all the parties, whereby they covenanted, each with all the rest, to pay their proportion of the expense, needful and incidental to the erection of a steam saw-mill in Michigan, and such sums as might be required for fixtures, &c.

The defendants covenanted to *honor the plaintiff's drafts on them*, to be made from time to time, as his contracts and the execution of the proposed plan might require, to an amount not exceeding \$8000; and that he might, *with the funds so be thus raised*, procure a steam engine, &c.; and

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they covenanted, also, to *defray the plaintiff's necessary expenses*, and to advance his proportional part of the common outlay.

The averments in the first count were, that, *with the consent of the defendants, a certain draft was drawn by the plaintiff upon and accepted by said Ewen*, (describing it,) as the means of providing, in part, funds to be applied to the purposes mentioned in said agreement. That it was customary to pay in advance for steam engines at the time of the contract; and that in this case, the advance would have exceeded \$500, of all which, &c., (special notice.) That the plaintiff was ready and could have entered into a suitable contract, &c. had he been furnished with funds; and he endeavored to raise them on the draft, but could not, of all which, &c., (special notice,) and he requested the defendants *to provide the necessary funds to enable him to enter into such contract*. That in travelling to and remaining at various places, upon and in the transaction of said business as aforesaid, *he necessarily incurred divers expenses* for travel, meat, drink, lodging, washing, and in postage, and continued to incur, &c.; and on, &c. gave notice to the defendants, and requested them to furnish him with \$500 to defray such expenses; that the defendants refused, and, by reason thereof, the plaintiff was put to additional expense. That he gave a particular account of his expenses, so necessarily incurred by him under the agreement aforesaid, in travel, &c. and whilst he was engaged, &c. and was necessarily employed and detained in and about the said business as aforesaid—amounting to \$457,11. Yet the defendants, not regarding, &c. did not nor would *honor, or cause to be honored, said draft, by paying, &c. the whole or any part, &c. though it was presented*, [showing how,] *but suffered it to be dishonored and protested*; and did not nor would, in any manner, *provide said plaintiff with funds*; and did not nor would *defray the necessary expenses of said plaintiff, or any part thereof*.

The *second count* was on the same articles, but confined itself to a breach in the non-payment of *expenses necessa*

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*rily incurred* by the plaintiff, in prosecuting the business on his part. The manner in which they were incurred, was set forth with great particularity. They were averred to have been incurred for the purposes of the agreement, with special notice to the defendants, and their refusal to pay.

Oyer, and then demurrer to the breaches, severally, in each count. Joinder in demurrer.

*D. P. Hall*, for defendants.

*J Greenwood*, for plaintiff.

*By the Court*, COWEN, J. The first breach is defective in not averring that the draft was drawn on *all the defendants*. That it was drawn on one only, with the consent of the others, perhaps may, or may not, according to the circumstances, amount, on the evidence, in legal effect, to the same thing. This, however, does not excuse the plaintiff from averring, by way of pleading, a compliance with the condition precedent according to its terms. He might, perhaps, have sustained himself against a general demurrer, by detailing facts amounting argumentatively to the same thing. Here he has not, I think, done even that; but it is enough, that the defect is pointed out by a special demurrer. We held, when the cause was before us on the first demurrer, that the presentation of a draft was a condition precedent; and that the condition must be complied with, before the defendants could be sued for a default in not fulfilling their covenant to pay. (*See 24 Wend. 153.*) The covenant is to honor drafts on *all the defendants*.

There is some difficulty in making out what is called a second breach in the first count, to be such. It is simply that the defendants did not nor would furnish the plaintiff with funds. Looking at the context, however, I presume it means, funds to purchase a steam engine, which the plaintiff says before, in his declaration, he had requested of the defendants. There is no covenant to furnish such funds,

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 West v. Stanley
 

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independently of the drafts; but a mere authority to lay out funds in the purchase of the engine, when furnished by the drafts. This demurrer is, therefore, well taken.

The demurrer to the third breach in the first count, and the demurrer to the second count, are neither of them well taken. They both go on the ground, that the plaintiff has not averred that he *incurred necessary expenses*, but merely that he *necessarily incurred* the expenses. This is a difference on words which are equivalent. The averment is full, that the expenses were incurred within the terms of the contract, showing their character with a particularity quite sufficient, and full notice to the defendants, with due requests.

The *first two* demurrers are allowed; the *last two* overruled.

Judgment accordingly.

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 WEST vs. STANLEY.

Matter of defence in a justice's court arising after issue joined, (e. g. a submission of the subject in controversy to arbitrators, followed by an award,) may be pleaded therein *puis darrein continuance*.

Pleadings in justices' courts are not required to be strictly formal, no objection having been there interposed to them on that ground.

A submission to arbitrators of the subject matter of a pending suit, and an award thereon, puts an end to the suit; and the plaintiff's remedy afterward is on the award.

Though a judge at the circuit *may* receive a plea *puis darrein continuance*, without proof of its truth; yet, *it seems*, he should reject it, unless verified in some way. Where, on tendering a plea *puis darrein continuance* to a justice, the defendant offered to verify it by affidavit, and it was rejected on the ground that pleas of that nature could not be received in a justice's court; *held*, that the justice erred, and the judgment should be reversed, though no affidavit was, in fact, made.

ON error from the Onondaga C. P. Stanley sued West in assumpsit, before a justice, and after issue joined, the cause was adjourned. On the adjourned day the parties appeared, and after a jury had been empaneled to try the cause, the defendant offered a plea, withdrawing his former pleas, and alleging that the parties, since the adjournment

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had submitted the matters in controversy in the suit to arbitration, and that the arbitrators had awarded that the defendant should pay the plaintiff \$8,16, which sum the defendant had tendered, and was still ready to pay the plaintiff. The defendant, on tendering the plea, offered to make affidavit of its truth, and to consent to an adjournment of the cause if the plaintiff desired it. The justice overruled the plea. The cause proceeded, and the jury found a verdict for the plaintiff for \$25, on which the justice gave judgment. On *certiorari*, the C. P. affirmed the judgment, and the defendant now brings error.

*E. Forman*, for the plaintiff in error.

*B. D. Noxon*, for the defendant in error.

*By the Court*, BRONSON, J. The justice seems to have proceeded on the ground that a plea *puis darrein continuance* could not be received in his court; but in that I think he was mistaken. True, issue must, in general, be joined in justices' courts, at the time of the first appearance of the parties. (2 R. S. 233, § 47.) But it was not intended by that provision to preclude the defendant from setting up matter of defence arising, as in this case, after the usual issue had been joined.

Pleadings in justices' courts are not required to be very formal; and this plea was good in substance. If there had been a submission of the matters in controversy in the suit to arbitration, the suit itself was at an end. The plaintiff's remedy was in the award.

A judge may, it seems, receive a plea *puis* at the circuit, without proof of its truth, (*Bancker v. Ash*, 9 John. 250;) though he may, and I think always should reject a plea which is not in some way verified. Although the defendant did not actually make an affidavit, he offered to do so; and as I understand the return, the plea was not rejected because the affidavit was not made, but because the plea itself was not admissible. In that, the justice erred.

Judgment reversed.

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 Ferriss v. The North American Fire Insurance Company.
 

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## FERRISS & EATON vs. THE NORTH AMERICAN FIRE INSURANCE COMPANY.

An act incorporating an insurance company, declares, that its policies, executed in a given mode, shall have the like force and effect as if under the seal of the corporation; and that *covenant* or *case* may be brought thereon: *Seemle*, that in a suit on such a policy, should the plaintiff declare expressly in *covenant*, in one count, and then add another, so constructed as to leave it uncertain whether it is in *case* or *covenant*, the defendant may treat it as the former, and demur for misjoinder of counts.

Otherwise, however, where the declaration commences with the usual introductory words, "in a plea of a breach of covenant;" for they apply to the whole declaration.

A demurrer for misjoinder of counts must be to the whole declaration; the defect cannot be reached under a demurrer to particular counts.

A condition of a policy declaring, that *all fraud or false swearing shall cause a forfeiture of claims on the insurer, &c.* relates solely to the preliminary proofs of loss; and in an action on the policy, a plea setting up fraud, &c. without showing that it was committed in the rendition of the preliminary proofs, is bad.

*A fortiori* is such plea bad, if it do not show that the fraud, &c. was committed by the insured or some party in interest.

Doubtful phraseology in a pleading, is to be construed most strongly against the pleader.

The defendants' act of incorporation provided for an assignment of the subject matter insured, as well as the policy; and that notice being given to the company before loss, the assignee should have all the benefit of the policy, and might sue in his own name. E. & F. being insured, the former executed to the latter, with the company's consent, and before loss, an assignment of all interest in the subject insured, as well as in the policy; and after loss, an action was brought on the policy in their joint names. *Held*, that a count in the declaration, alleging such assignment, was bad, as showing that the plaintiffs could not sue jointly: and a plea *in bar*, setting up the same facts in answer to another count, was adjudged good.

For the purposes of this suit, the plea was, in effect, the same as a plea that *both* plaintiffs had assigned.

Whether the matter might be pleaded in *abatement*, *quere*.

In *assumpsit*, a plea of misjoinder of plaintiffs would be bad, as amounting to the general issue; but otherwise, in *covenant*.

**ACTION** on a policy of insurance. The declaration commenced as in an action of *covenant*, thus: "The N. A. F. Ins. Co. (defendant) was summoned, &c. to answer N. Ferriss and J. E. Eaton (plaintiffs) in a plea of breach of covenant," &c.

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The first count set out a policy of insurance of \$5000 on the plaintiff's stock of goods, dated December 14th, 1837, signed by the president and countersigned by the secretary of the insurance company, with profert; and the count called the policy a *deed poll*, but averred no seal.

The *second count* was on a like policy generally, (with profert,) without calling it a deed, or averring that it was under seal. This count averred that the plaintiff Eaton, with the defendants' consent, regularly sold all his interest in the subject insured, and in the policy, to the plaintiff Ferriss, before the loss happened.

Both counts averred the loss, and the presentment of the usual preliminary proofs. The policy was set forth on oyer, in *hæc verba*, as without seal.

To the first count, the defendants put in several pleas.

The *third* of these was *in bar*, a sale of Eaton's interest in the subject insured, and in the policy, to Ferriss, with the consent of the defendants, before loss, as averred in the second count.

The *fifth plea* to the first count, was drawn in reference to a clause contained in the conditions of insurance, as follows: "All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurers on the policy." The plea alleged, that "the claim of the said plaintiffs, &c. was falsely and fraudulently greatly enlarged and exaggerated, with intent to deceive and defraud the said defendants, and to receive from them more than the true amount thereof in this, to wit, that the said loss was stated and claimed to be the full amount insured in and by the said policy, being the sum of \$5000, whereas, in truth, &c. the same was much below that sum, and did not exceed the sum of \$1000, which the plaintiffs always, from the time of said loss, well knew and understood," &c.

The *defendants* demurred to the *second count* of the declaration; and the *plaintiffs* demurred to the said *third* and *fifth* pleas, assigning among other causes of demurrer, that the third plea should have been in *abatement*, and not in

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bar—and that the *fifth* plea did not specify by whom the fraud therein alleged had been practiced. Joinders in demurrer.

W. C. Noyes, for defendants.

S. Stevens, for plaintiffs.

*By the Court, CowEN, J.* This company was originally incorporated by the name of *The Phœnix Fire Insurance Company of the city of New-York*. (Sess. Laws of 1823, p. 111.) The tenth section, (*id.* p. 115,) declares, that policies executed as this is, though without the corporate seal, shall have the like force and effect, to all intents and purposes, as if the seal of the corporation had been or was affixed there to, and that an action of *covenant*, or *on the case*, may be maintained thereon against the corporation. The name was subsequently changed to *The North American Insurance Company*, by Sess. Laws of 1836, (*ch.* 99, p. 140.) These statutes furnish an answer to the demurrer which objects to the form of the second count. It is said, that count should have been in *covenant*, expressly and in terms, or it could not be joined with the first count, which is clearly *covenant*; that it is equivocal, and may be considered as a count in case, or *covenant*; that the policy not being treated therein as a deed, the plaintiffs must be taken to have elected under the statute to bring case; and therefore here is a misjoinder of counts. Independently of the introductory words of the declaration, I should think the objection good. The 'plaintiffs' second count, in itself, being equivocal in this respect, the defendants might elect to consider it *in case*, under the rule that doubtful words must be taken most strongly against the party pleading. I am inclined to think, however, this doubt may be taken to be removed, by the introductory words, "in a plea of a breach of *covenant*," which, as always understood, when in that place, apply to the whole declaration. But without deciding that point, the demurrer is not taken in such a form as



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to raise the question. A demurrer for a misjoinder of counts, must be to the whole declaration. (1 *Chit. Pl.* 180, 394, *Am. ed. of 1828, marg. pages.*) Here the demurrer applies to the second count only, which, taken independently, is valid, whether it be in case or covenant. The substantial objection to this count will be considered in the sequel.

Another question of form is raised by the demurrer to the fifth plea to the first count, viz. the plea of fraud. One condition of the policy is, that all fraud or false swearing shall cause a forfeiture of claims on the insurer; and shall be a full bar to all remedies against the insurer, on the policy. Looking at the nature of a policy, and the context of this and others containing the like clause, there can be no doubt that it means fraud, &c. in the preliminary proofs only. It would be idle as applied to the original concoction of the policy, which is always avoided by the common law, for the least want of good faith in the assured. The plea, therefore, should have averred, that the alleged fraud was committed in the rendition of the preliminary proofs; but above all, that it was committed by the plaintiffs or some party in interest. Both are said to be implied by the plea; and by a somewhat liberal course of intendment, I admit that may be made out. But by the rule, that a title or defence must always be expressly stated in pleading, in order to sustain it against a demurrer, a very serious doubt arises upon its import. No one is named as a party to the fraud, nor is it averred to lie in the preliminary proofs. The case is open to the implication, that the fraud might have been committed by some one over whom the party in interest had no control. That is highly improbable, I admit; but we are not called to the office of presumption after verdict. The question arises on demurrer, specially assigning for cause, that the plea does not fasten the fraud upon the party. Under the rule before adverted to, and applied to the second count, the plea, being equivocal, must be taken most strongly against the defendant.

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But the vital question in this particular action, is raised by the demurrer to the third plea to the first count, and is involved in the demurrer to the second count of the declaration; viz. that the plaintiff *Eaton*, having assigned to the plaintiff *Ferriss*, before the loss happened, all interest in the subject of the policy, and in the policy itself, and that with the consent of the defendants, the former should not have been joined as a party plaintiff; but the action should have been brought by *Ferriss* alone.

It is supposed that the plea fails to raise this question, inasmuch as it is a plea in bar, whereas it should have been in abatement for a misjoinder. The plea is, that one of the plaintiffs has assigned his legal interest to the other. It is, in effect, the same as a plea that all the plaintiffs had assigned their interest. The plea, if valid, destroys the right of the plaintiff *Eaton*, and the right of both when they come jointly. The case is probably about the same as a plea, that one of several plaintiffs has assigned under the statute of bankruptcy, or setting up his attainder where the cause of action is forfeited. It is very questionable whether such matter be not merely in bar; though it is said of outlawry, forfeiture or attainder, pleaded against a sole plaintiff, that either may be pleaded in bar, or abatement, at the defendant's election. (1 *Chit. Pl.* 386, *Am. ed.* of 1828.) But the misjoinder of plaintiffs is always a matter which operates as a bar in assumpsit, even on the general issue. Therefore, if pleaded, it would amount to the general issue, which is a plea in bar. (*Vide Facquire v. Kinaston*, 2 *Ld. Raym.* 1249.) In covenant, it is equally a matter in bar, and, I think, properly pleaded as such. It is not necessary to deny, that it might also be pleaded in abatement; a form to which some books certainly give countenance.

Upon the main question, the 14th section of the act incorporating this company seems to be decisive. It declares, that in case any person or persons assured shall assign the subject matter, he may also assign the policy; and notice being given to the company before the loss happens, the assignee shall have all the benefit of the policy,

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and may sue in his own name. That is this case. Eaton's interest, both equitable and legal, departed on executing the assignment, as much so as that of an insolvent debtor, on executing his assignment, and obtaining his discharge. All right vested in Ferriss. This is fatal to the action; and there must be judgment for the defendants on the demurrer to the second count of the declaration, and to the third plea to the first count; and for the plaintiffs, on the demurrer to the fifth plea to the first count.

Judgment accordingly.

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WATTS vs. VAN NESS.

An attorney's clerk, engaged at a weekly salary to do such things as are usually done by clerks in attorneys' offices, is prohibited by the statute to prevent working on Sunday, from recovering of his principal a compensation *extra* his weekly allowance, for services as a clerk performed on that day.

A person sworn as a witness before a justice of the peace, though entitled, as against the party calling him, to fees for attendance, cannot maintain an action therefor against the justice.

MOTION to set aside report of referees. The report was for the plaintiff \$52,15. The facts are sufficiently stated in the opinion of the court.

*D. V. N. Radcliff*, for the defendant.

*C. W. Swift*, for the plaintiff.

*By the Court*, BRONSON, J. The defendant, who is an attorney at law, employed the plaintiff for about one year, to work in his office, copying papers and doing other things, such as are usually done by a clerk in an attorney's office, at a weekly salary; and in this action, the plaintiff, among other things, claimed to recover for his labor in the office on *Sundays* during the year, over and above the weekly salary. The referees have allowed \$19 for those *Sunday* services; and they have also allowed the plaintiff \$3, for work done in the office on *Sunday*, after the general employment was at an end. These services were rendered in the ordinary call.

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ing of the parties, and were, I think, within the prohibition of the statute against "working" on Sunday. (1 R. S. 675, § 70.) There is no ground for saying, that the case is within the exception. These were not "works of necessity or charity," and there is no pretence that the parties keep the last day of the week. I think the referees erred in allowing the \$22.

The defendant is a justice of the peace, and the plaintiff, during his employment in the office, was often sworn as a witness, in suits pending before the defendant. The referees have allowed the plaintiff \$5, for witness' fees on those occasions. This is wrong. The plaintiff was entitled to a shilling for each attendance, but he had no right of action against the justice for it. His remedy was against the parties on whose behalf he was called. (*Andrews v. Bates*, 5 John. R. 351.) The defendant said, the plaintiff would be entitled to his fees for swearing as a witness. That was no more than the truth. The plaintiff is entitled to his fees, but not from the defendant.

The report must be set aside, unless the plaintiff consents, within twenty days, to deduct \$27 from the amount.

Ordered accordingly.

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STICKLE vs. RICHMOND.

Where, in trespass, assault and battery, and false imprisonment, the defendant pleaded the general issue to all except the false imprisonment, and as to that, a special plea, setting out a warrant for felony issued by a justice of the peace, and that by virtue thereof he arrested the defendant, &c.; *held*, that a replication protesting the warrant, and its delivery to the defendant to be executed, and then replying *de injuria sua propria absque residuo causæ*, was good.

Such a replication is not open to the objection, that it attempts to put in issue several distinct matters, or that the traverse is taken to a mere conclusion of law.

The general replication, *de injuria*, &c. to such a plea, would be bad; and, in this respect, the rule is the same, whether the justification be under process from a court of record, or not of record.

A replication like the one in question admits, it seems, the warrant in the defendant's hands, and devolves on the plaintiff the *onus* of showing that

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though the defendant had the warrant, he did not make the arrest by virtue of it.

Had the plaintiff intended to rely on a different arrest from the one justified, or on the act having been done under some pretended authority, other than the warrant, he should have new assigned, or replied setting up the special matter.

DEMURRER to replication. The declaration was for trespass, assault and battery, and false imprisonment; alleging that the defendant, on, &c. at Redhook, in the county of Dutchess, with force, &c. assaulted and beat the plaintiff, and compelled him to go in and along divers roads, &c. from Redhook aforesaid to the county of Onondaga, and then and there imprisoned the plaintiff, and detained him in prison, without any reasonable or probable cause, for a long space of time, to wit, ten weeks, contrary to the laws and customs, &c. Plea *second*, as to the beating and wounding &c. and as to all the supposed trespasses in the declaration mentioned, *except* as to arresting the plaintiff at Redhook, and carrying him to the county of Onondaga, and keeping him there until discharged, &c. *not guilty*; and as to the *residue* of the trespasses, &c., *actio non*, because the defendant says, that before the said time, when, &c. to wit, on the 29th April, 1838, at Camillus, in the county of Onondaga, the defendant made complaint, on oath, before Charles Laud, a justice, &c. against the plaintiff, for feloniously setting fire to the defendant's barn in the night time; that the justice thereupon issued a warrant for the arrest of the defendant to answer the complaint, and delivered the warrant to Daniel Gleason, a constable of Camillus, to be executed; that afterwards, on the 2d May, 1838, the warrant was duly endorsed by Charles Kent, a justice of Dutchess county, where the defendant then was; that Gleason, the constable, *by virtue of the warrant and endorsement*, on the 2d May, 1838, arrested the plaintiff at Redhook, and compelled him to go in and along divers roads, &c. by the usual route, to the town of Camillus, and detained the plaintiff in his custody for the purposes aforesaid until the 8th of May, 1838, doing no unnecessary damage, &c. when the defendant was examined by the justice who issued the warrant, and duly

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discharged ; which are the same supposed trespasses, &c. Verification. The *third* plea substantially like the second.

*Replication* to the second and third pleas, that the plaintiff ought not to be harred, &c., because, *protesting* that the said warrant was not issued, &c. nor delivered to the said constable to be executed ; and that the same was not countersigned by the justice in Dutchess county, &c. ; *for replication* nevertheless in this behalf, the plaintiff says, that the defendant, at the said time when, &c. *of his own wrong, and without the residue of the cause* in the second and third pleas alleged, made the assault in the declaration mentioned, and then and there beat the plaintiff, &c. and imprisoned him, &c. as the plaintiff has in his declaration complained, &c., concluding to the country. Special demurrer and joinder.

A. Taber for defendant.

O. Allen & S. Stevens, for plaintiff.

*By the Court*, BRONSON, J. A distinction was taken in *Croft's case*, (8 Co. 132,) between a justification under legal process from a court of record, and from a court not of record. Although both justifications were equally good, yet, in the former case, the general replication *de injuria* was deemed bad, but in the latter it was said to be good. This distinction seems still to be regarded as a solid one in Westminster Hall, as appears by the recent decision of the K. B. in *Selby v. Bardsons*, (3 Barn. & Ald. 2.) It was there held, by Parke and Patteson, Js., against the opinion of Lord Tenterden, that to an avowry in replevin, under a warrant of two justices of the peace for a poor rate, the plaintiff might plead in bar *de injuria* generally. It is unnecessary to inquire whether this be good law in England. It is enough that it is not law in this state. In *Coburn v. Hopkins*, (4 Wend. 577,) the defendant justified under a warrant issued by a justice of the peace, and the general doctrine was applied, that as the defendant set up a *right*, and not mere matter of *excuse*, the general replication *de*

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*injuria* could not be supported. If the plaintiff had replied *de injuria* generally, the replication would undoubtedly have been bad. But the plaintiff has not attempted to put the whole matter of the plea in issue. He has *protested*, that is, *admitted*, the warrant, the delivery of it to the constable to be executed, and the endorsement of the process by the justice in Dutchess; and then replied, *de injuria sua propria absque residuo causæ*. The distinction upon which the pleader has acted, in drawing this replication, was hinted at in *Crogate's case*; and it was plainly laid down by Denison, J. in *Robinson v. Rayley*, (1 Burr. 320.) He says, the replication *de injuria, &c.* will do in all cases where matter of title, and other things of that kind, are not included in the *absque tali causa*; and if you admit them, you may then plead, *de injuria sua propria absque residuo causæ*—traversing that residue. This form of replying is approved by Mr. Chitty. He says, the plaintiff must either deny the title, easement, warrant, &c. in particular; or admitting those matters, must reply that the defendant of his own wrong, and without the residue of the cause alleged, committed the injury. (1 Chit. Pl. 640, 1, 649, 7th Am. ed.) In the third volume, (p. 1204,) he has given a precedent for this replication. If the traverse does not include too much, I see no reason why it may not be in this form, as well as by a more direct denial of the matter intended to be put in issue.

The replication is not subject to the objection, that it puts several matters in issue. As to the force of such an objection, when true in point of fact, see the last resolution in *Crogate's case*, (8 Co. 132;) *Per Willes, C. J.* in *Cockerill v. Armstrong*, and in *Bell v. Wardell*, (*Willes' R.* 99, 202;) *Selby v. Bards*, (3 Barn. & Ald. 2, *per Patteson, J.*) In this case, I do not see that the plaintiff has put in issue more than a single fact. He says, in answer to the justification, true it is, the warrant issued, was delivered to the officer, and duly endorsed; but still, the defendant did the wrong complained of, without the residue of the cause alleged in the plea. This traverse covers nothing but the allegation, that the arrest and imprisonment

ment were *by virtue of the warrant*. The plaintiff admits that there was legal authority to arrest, but denies that the arrest was made by virtue of that authority. Such an issue is not subject to the objection, that it involves a multitude of matters.

The traverse is not open to the objection, that it is taken to a mere conclusion of law. The allegation, *virtute cuius*, in pleading, is sometimes an inference of law upon the facts previously stated; and then there could be no traverse; for that would be to withdraw the law from the court, and refer it to the jury. But, *virtute cuius*, sometimes includes both law and fact, and then it may be traversed. (1 *Saund.* 23, n. (5). 1 *Chit. Pl.* 645. *Lucas v. Nockells*, 4 *Bing.* 729. 2 *Young. & Jerv.* 304, S. C.) In the case at bar, the plea does not first set up certain facts in justification, and then conclude, *by virtue whereof* the arrest was *legal*. That would be an inference of mere law. But after stating the warrant, endorsement, &c., the pleader adds, that *the arrest was made by virtue of the process*. That is the point to which the traverse goes. The plaintiff says, true, you had the warrant, but you did not use it—the arrest was not made by virtue of it. If there be some matter of law included in the traverse, there is also some matter of fact; and I think the replication is not chargeable with the fault of referring to the jury, that which properly belongs to the court.

But although the replication may be upheld on demurrer, I cannot but think there is a fault in it which the plaintiff will discover on the trial. He has not new assigned, as the plaintiff did in *Lucas v. Nockells*, (4 *Bing.* 729.) Nor does he set up any abuse of the authority, nor allege that the trespass of which he complains, is a different one from that which the defendant has justified. When he comes to the trial, if the demurrer is withdrawn, the plaintiff will find that it stands admitted on the record, that the officer who made the arrest had in his hands sufficient legal process to justify the act; and the *onus* will then lie on the plaintiff to show that the arrest was not made by virtue of



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the warrant: for who ever heard of calling on the officer to prove that he acted under the process which he had at the time in his pocket? The jury would be bound to find that the arrest was made by virtue of the warrant, if the fact was not disproved. And how can it be disproved, but by showing some other affirmative fact? If the plaintiff intends to show that there was a different arrest from that which has been justified by the plea, that the act was done under color of some other pretended authority than the warrant in question, or the like, he will probably discover that there should have been a new assignment, or a replication setting up the particular matter upon which he intends to rely.

But it is sufficient, for the present, to pass upon the pleading, and we think the replication good.

Judgment for plaintiff

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 QUIN vs. HANFORD.

D., having contracted with the trustees of a religious society to do the carpenter's work of a church they were about erecting, and afterward becoming indebted to the plaintiff for doing part of it, gave him an order on the defendant, who was then treasurer of the corporation, and likewise one of the trustees, and a member of the building committee; which order the defendant, on its presentation to him, promised should be paid in eight or ten days. There were then funds enough in the defendant's hands, as treasurer of the corporation, to meet the order, but *none specifically appropriated to D.*, the drawer; and the treasurer was not authorized to pay orders, unless countersigned by the building committee. Under these circumstances, *held*, that the defendant's promise was without consideration; but even were there a consideration, it was a promise to pay the debt of a third person, void for want of writing within the statute of frauds.

Regarding the order, moreover, as a bill of exchange, the acceptance was void, because not in writing.

The case is not like those, where assumpsit has been held to lie against an executor, on his promise to pay the testator's debt, or a legacy, and judgment was rendered *de bonis propriis*—for the assets in the hands of an executor are at his disposal exclusively; but in this case, the defendant held the funds of the society as bailee, subject to their control.

*Seem*, even were the promise valid, the plaintiff could not recover under a count for money had and received.

Had the defendant, instead of the society, been D.'s debtor, the order might

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have operated an assignment of the debt; in which case, on an express promise to pay, an action could, it seems, be maintained. And it would be sufficient, under such circumstances, to declare for money had and received.

The principle is the same, where the person on whom the order is drawn has funds in his hands belonging to the drawer, and promises to pay.

ON error from the New-York common pleas. Hanford sued Quin in assumpsit, in the court below. The declaration was on the *money counts*, and an account stated. On the trial the case was this: James Dempsey made a contract with the trustees of Christ Church, New-York, to do all the carpenter's work on the church which the society was erecting, for the sum of \$10,900, to be paid by instalments as the work progressed—the last instalment, which was \$900, being payable when all the work was completed. The plaintiff worked for Dempsey, and Dempsey gave him an order on the *building committee* or the *treasurer* of the society, for \$200. The defendant was the treasurer of the society, and one of the building committee, of whom there were three in all. The plaintiff presented the order to the defendant, who said, "there was in hand 8, 9 or \$1000 of money due to Dempsey for building the church, and that the plaintiff should have his money in the course of eight or ten days." On cross-examination, the witness said—"the 8, 9 or \$1000 which Quin spoke of, he [Quin] said was the balance in hand coming to Dempsey for building the church." The defendant took the order and pinned it into an account book of Dempsey's which was in the office, and kept it. This was early in January, 1837. The work was not then completed. Dempsey was sick, but his hands were at work, and the job was completed about the 29th of that month. About a fortnight after the order was presented, the plaintiff went for his money, and the defendant objected to paying it, saying liens had come in.

At the time the order was presented, Dempsey had been paid all but the last instalment of \$900, which was not payable until the work should be completed, and he had encroached about \$200 on that instalment. Dempsey was sick, and the society had to pay some of his men to get the

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work completed, but how much, did not appear. The defendant had no funds upon which Dempsey could have any claim, except as treasurer of the corporation; and had no authority to pay, until the orders were countersigned by the building committee, of which he was one. A motion for a nonsuit was overruled; and the judge charged the jury, among other things, that if the defendant made an express promise to pay, as one of the witnesses had testified, the plaintiff was entitled to recover. Exception. Verdict for plaintiff. The defendant now brings error on a bill of exceptions.

*C. O'Connor*, for the plaintiff in error.

*W. S. Sears*, for the defendant in error.

*By the Court*, BRONSON, J. From what was said when the order was presented, I infer that the defendant spoke of the balance which was, or would be due to Dempsey; and not of any sum of money in the defendant's hands as treasurer of the society. But the testimony which was afterwards given, that the defendant had no funds *except as treasurer of the corporation*, contains an implication that he had money in his hands belonging to the society at the time the order was presented. Assuming that fact to be sufficiently established, the question then is, whether this action for money had and received to the plaintiff's use can be maintained.

If this was a promise to pay the debt of a third person, then, whether there was a sufficient consideration or not, the promise was void within the statute of frauds, for not being in writing. And if the order can be regarded as a bill of exchange, the acceptance was void because not in writing. (1 R. S. 768, § 6.) We must, therefore, look for some other ground on which to uphold the action.

If the defendant, instead of the society, had been a debtor to Dempsey, the order might be regarded as an assignment of the debt to the plaintiff; and then, on an ~~express promise~~

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to pay the plaintiff, the action could be maintained; and it would, perhaps, be sufficient to count for money had and received to the plaintiff's use. (*Israel v. Douglass*, 1 *H. Black.* 239. *Ward v. Evans*, 2 *Ld. Raym.* 928. This case is also reported, 2 *Salk.* 442, *Comyn's R.* 138, *Holt's R.* 120, 6 *Mod.* 36, and 12 *id.* 521. *Crocker v. Whitney*, 10 *Mass. R.* 316. *Wilson v. Coupland*, 5 *Barn. & Ald.* 228.) The principle is the same, where the person on whom the order is drawn has funds in his hands belonging to the drawer. (*Weston v. Barker*, 12 *John. R.* 276. *McMenomy v. Ferrers*, 3 *id.* 71. *Langston v. Corney*, 4 *Camp.* 174.) But there is a difficulty with the plaintiff's case. The defendant was not a debtor to Dempsey, nor had he any funds in his hands which belonged to Dempsey. The most that we can infer from the evidence is, that the defendant had funds in his hands belonging to Dempsey's debtor—the society. Neither Dempsey nor his assignee could acquire any right to that money, until the society, which was the owner, should make a transfer or give some direction concerning it. The money might be appropriated to pay another debtor, or to any other use which the society might deem proper. Although Dempsey could assign the debt which was due to him from the society, he could not transfer the funds in the defendant's hands, for the obvious reason, that they were not his to dispose of. The defendant neither received nor held the funds to the use of Dempsey. He received and held them to the use of the society, of which he was the treasurer.

The cases which tend most strongly in favor of the plaintiff, are those in which it has been held, that assumpsit will lie against an executor, on an express promise to pay a debt of the testator or a legacy, in consideration of assets, and where the judgment is *de bonis propriis*. (*Trewinian v. Howell*, *Cro. Eliz.* 91. *Atkins v. Hill*, *Cowp.* 284. *Hawkes v. Saunders*, *id.* 289. And see *Bank of Troy v. Topping* 9 *Wendell*, 273.) Although I am unable to see how the possession of assets, makes a sufficient consideration to uphold such a promise, it is enough that the question is settled

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upon authority. But there is a plain distinction between these cases and the one at bar. If an executor have sufficient assets for the payment of debts and legacies, the fund is at his disposal, and not subject to any other control. But here, the defendant was a mere depositary of the money. He held it as the bailee of the society, and subject to its order. The church could not only direct him to pay any other creditor in preference to Dempsey, but it could, at pleasure, recall the fund and place it in the hands of another agent. It appears affirmatively, that the defendant had no authority to pay out the funds, until the amounts or orders had been countersigned by the building committee. It is impossible to maintain that there was any consideration for his promise. It was an undertaking to pay the debt of a third person, without either consideration or writing; both of which are necessary to uphold such contract. The defendant said, the plaintiff should have his money in eight or ten days, but there was no contract for forbearance. In *The Bank of Troy v. Topping*, (9 Wendell, 273,) the administrators had given their promissory note for the debt of the intestate, payable in sixty days; and yet it was held, that that fact alone did not prove a contract for forbearance.

If the promise had been in writing, and upon sufficient consideration, I do not see how the action, in its present form, could be maintained. In the cases where an executor has been held liable, on a promise to pay the debt of the testator or a legacy, the plaintiff has counted specially on the promise. But here, the plaintiff seeks to recover as for money had and received to his use. The defendant has no such money in his hands.

**Judgment reversed.**

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Parker v. Newland.

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## PARKER vs. NEWLAND.

The defendant having taken out criminal process, put it into the plaintiff's hands, who was a constable at Utica, with directions to proceed to Buffalo and serve it, which the plaintiff did; but before starting, he asked the defendant for money, saying he had not enough to go with; whereupon the defendant let him have \$30. *Held*, that this must be regarded as money lent, notwithstanding a declaration of the defendant afterward, that it had cost him \$40 or \$50 for constable's fees; especially, as the plaintiff had presented his claim for the services to the board of supervisors, and obtained the proper allowance.

A constable taking fees beyond the amount allowed by law, is indictable as for a misdemeanor.

A party injured by a judgment, may claim to have it reversed, though rendered in his own favor.

ON error from the Oneida C. P. Newland sued Parker before a justice, and on issue joined, proved a judgment in his favor against Parker for \$2,77. The defendant below, under a proper notice, claimed a set off amounting to \$30, for money he let the plaintiff below have, under the following circumstances. The defendant had taken out a warrant in behalf of the people against one Wood, which he put into the hands of the plaintiff below, he being a constable at Utica, with a request that the plaintiff would proceed to Buffalo and arrest Wood on the warrant, and the plaintiff went. When the plaintiff was about starting, the defendant let him have \$30 in money. The language of the witness who proved this, was, that "defendant advanced to plaintiff \$30 at the time plaintiff had the warrant in his hands." On cross-examination, the witness said, "plaintiff asked defendant if he had any money—he said he had—plaintiff said he had not enough to go with, and wanted \$30, and defendant let him have \$30." This money the defendant claimed to recover as a set-off. It was proved that he had said, it cost him \$40 or \$50 for constable's fees. The plaintiff proved that the journey to Buffalo would occupy 7 or 8 days, and another constable said, he charged: \$3 per day for such services. The defendant proved that

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Parker v. Newland.

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the plaintiff had presented his account to the board of supervisors of Oneida county, in which he charged for this service about \$40, and that the board had allowed his account for these and other services at \$521, being nearly the whole amount of the account as charged. The jury found a verdict for the defendant for \$5, on which the justice rendered judgment. The defendant brought a certiorari to the C. P., on the ground that the whole of the \$30 should have been allowed to him as a set-off; but the C. P. affirmed the judgment, and awarded costs to the plaintiff; and the defendant now brings error.

*J. Benedict*, for plaintiff in error

*W. M. Allen*, for defendant in error.

*By the Court*, BRONSON, J. The fair inference to be drawn from the evidence is, that the defendant made an advance or loan of money to the plaintiff, to enable him to proceed to Buffalo and execute the warrant. As this was criminal process, the fees were not to be paid by the defendant, but by the county. And besides, nothing was said about fees. The plaintiff, when about to start, asked the defendant if he had any money, and on being answered in the affirmative, he said he had not enough to go with, and wanted \$30, which sum the defendant thereupon let the plaintiff have. The plaintiff has presented his account to the board of supervisors for the service which he rendered, and has had the proper allowance against the county. I see no ground on which he can rightfully retain the defendant's money. He certainly cannot wish to put his case on the ground of taking \$30 from the defendant, beyond the fees allowed by law. (2 R. S. 750, § 4.) Such an act is expressly forbidden, and the person offending, is subject to indictment for misdemeanor. (*Ibid.* 650, § 5, 7.) And see *Hatch v. Mann*, (15 Wend. 44.) The jury mistook the law, when they gave the plaintiff, as they did in effect by their verdict, \$22.23 of the defendant's money. Although

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Pinney v. Hall

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the verdict and judgment were in favor of the defendant, he has sustained a legal injury which may be redressed by certiorari and writ of error.

Judgment reversed.

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PINNEY & PRICE vs. HALL.

Where a note was given for a fanning mill, conditioned, that if the maker was not suited with it, he should return the same in a given time to the payees, they, in that event, to furnish him with a new mill: *held*, that the maker having returned the mill within the time, and refused to accept a new one, though offered him by the payees, he was entitled to no abatement from the amount of the note by reason of latent defects in the mill.

ON error from the Oswego C. P. Pinney and Price sued Hall before a justice, and declared upon a note as follows: "New improved Fanning Mill. Town of Scriba, June 24th, 1836. On the first day of January next, for value received, I promise to pay Pinney & Price or order, twenty-eight dollars with use, at Fitch's store in Central Square, cash price. This note was given for a fanning mill. If the signer is not suited with the mill, he is to return the same to Pinney & Price's factory in Central Square, by the first day of December next, and they are to furnish him a new mill at that place, provided the signer takes good care of the mill and keeps the same in his own barn. If this is one half paid when due, a credit of the other half is to be given one year longer. David Hall." On issue joined, the justice rendered a judgment for the plaintiffs for the amount of the note and interest, of \$29,30. The defendant appealed to the C. P. On the trial in that court it appeared that the fanning mill was a poor one, and that the defendant returned it to the plaintiffs' factory, at Central Square, within the time mentioned in the note. The plaintiffs then had more than twenty mills in the factory, and offered the defendant his pick among them, but he declined taking another. The plaintiffs refused to give up the



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Pinney v. Hall.

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note—insisting that the bargain was, that the defendant should take another mill if dissatisfied with the first.

The court charged the jury, among other things, that there might be a question from the testimony whether the plaintiffs did not refuse to take back the mill—that if they had refused to take it back or furnish a new one, the property of the mill remained in the defendant; and that the defendant was entitled to an abatement in the price, if there were any misrepresentations, or latent defects not made known. The plaintiffs *excepted*. The plaintiffs asked the court to charge, that if the plaintiffs offered the defendant a new mill on the return of the old one, the defendant was not entitled to any abatement in the price of the mill. The court refused so to charge, and the plaintiffs *excepted*. Verdict for plaintiffs, \$6. The damages having been reduced more than \$10, the court awarded costs to the defendant, which were taxed at \$54,30. Judgment was rendered that the defendant have execution for the balance, after deducting the verdict of \$6. The plaintiffs now bring error.

*Grant & Allen*, for plaintiffs in error.

*Hulbert & Casey*, for defendant in error.

*By the Court*, BRONSON, J. It is quite clear upon the evidence, that the plaintiffs were ready and willing to take back the first mill, and furnish the defendant with another in pursuance of the contract. They had more than twenty mills in the factory at the time, and there was no proof that they were not good ones. The defendant declined taking another at that time, and said he would call at a future day. There was no evidence which made it proper to submit to the jury the question, whether the plaintiffs had not refused to take back the first, or to furnish the defendant with another mill.

The parties provided by the contract what should be done, in case the defendant should be dissatisfied with the

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Labron v. Woram.

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mill. He was to return it and take another. That was his remedy. He had no right to refuse taking another mill, and then insist on an abatement in the price agreed to be paid for the first.

Judgment reversed.

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LABRON & IVES vs. WORAM.

Where the plaintiffs endorsed a note payable to the order of the defendant, which, as they knew, was created and intended to secure the latter for a loan to be made by him to the maker; and the defendant, after making the loan, negotiated the note, putting his own name on the back: *held*, that though the plaintiffs had paid it, they could not subject the defendant as first endorser.

Had the note not been negotiated, the defendant might have written a guaranty over the plaintiffs' names, and, in that form, recovered from them the amount of the note.

If the plaintiffs had put their names on the note as ordinary endorsers merely, without knowledge of the negotiation between the maker and the defendant, they would have been entitled, *it seems*, as against the defendant, to all the rights of second endorsers.

Where the judge at the trial submitted a question to the jury which had not been made by the evidence, and the party prejudiced by it, instead of excepting specifically on that ground, asked instructions on another matter, which were not given, the judge instructing the jury differently, whereupon the party excepted, in general terms, "*to the judge's charge*:" *HELD*, that the exception could not be construed as reaching beyond the matter which immediately preceded it, and therefore the party was remediless, on error, as to the other point.

His remedy was either by a more specific exception, or a motion in the court below for a new trial.

An exception for the admission of evidence, not sufficient, *per se*, to make out a defence, but constituting part of a chain of proofs tending to that end, cannot be sustained.

ON error from the New-York common pleas. *Labron & Ives* sued *Woram* in the court below, and on the trial, sought to recover the amount of a promissory note for \$635, dated June 21, 1836, made by *A. H. Nichols*, payable to the order of the *defendant*, twelve months after date, and endorsed by the defendant. It was proved by way of

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*Labron v. Woram.*

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defence, that Nichols applied to the defendant to borrow money, which the defendant agreed to loan on the note of Nichols, endorsed by the plaintiffs. Nichols thereupon drew the note in question, and, as he testified, inadvertently made it payable to the order of the defendant. He took the note to the plaintiffs and requested them to endorse it, which they did. The note at this time had not been endorsed by the defendant. After the plaintiffs had endorsed, Nichols took the note to the defendant, and passed it to him, on receiving a loan of \$600. The defendant afterwards negotiated the note, and on that occasion put his name upon the back of the note as an endorser. The above testimony, showing the origin and consideration of the note, and how it came to be made payable to the defendant, was objected to, and the objection overruled, to which the plaintiffs excepted. When the note came to maturity, it was protested for non-payment, and was afterwards paid and taken up by the plaintiffs. The defendant gave evidence, which, as he insisted, tended to show that the plaintiffs endorsed the note as sureties for Nichols, to enable him to raise money from the defendant. The judge charged the jury, among other things, that if, from all the circumstances, they were satisfied that there was a mistake made in drawing the note, and that the plaintiffs, when they endorsed, did not intend that the defendant should be responsible to them for the payment of the note, then the plaintiffs had no right to recover. The plaintiffs' counsel thereupon requested the judge to charge in a particular way in relation to another matter. He declined to charge in that way, and gave a different instruction to the jury. The bill of exceptions states that "the counsel for the plaintiffs excepted to the judge's charge." The jury found a verdict for the defendant, and judgment having been rendered accordingly, the plaintiffs bring error.

*A. Thompson*, for plaintiffs in error.

*I. W. Gerard*, for defendant in error.

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*By the Court, BRONSON, J.* If the plaintiffs knew of the previous negotiation, and put their names on the note for the purpose of becoming sureties to the defendant for the loan to Nichols, they cannot maintain this action. In that case, the defendant, if he had not negotiated the note, might have written a guaranty over the plaintiffs' names, and in that form have recovered the amount of the note from them. (*Nelson v. Dubois*, 13 Johns. R. 175. *Campbell v. Butler*, 14 id. 349; and see *Dean v. Hall*, 17 Wendell, 214.) Although the defendant negotiated the note, the plaintiffs have only been compelled, in another form, to answer as sureties for Nichols.

But if the plaintiffs, at the time they endorsed, did not know what use was to be made of the note—if they did no more than put their names on the back of the note made payable to the order of the defendant, then they must be regarded as second endorsers, with all the rights incident to that relation. (*Herrick v. Carman*, 12 John. R. 159.) Had the note remained in the defendant's hands, he could not have recovered on it against the plaintiffs; and having endorsed and negotiated it, he would be answerable to the plaintiffs as first endorser—the plaintiffs having been compelled, as second endorsers, to pay the note to a third person.

I agree with the plaintiffs' counsel, that the evidence was insufficient to defeat the plaintiffs' action. There was no proof which would authorize the jury to find, that the plaintiffs, at the time they endorsed, knew what use, in particular, Nichols intended to make of the note. They did not know that it was going into the defendant's hands; and, for aught that appears, they may have endorsed in the belief, that the note could be of no force as against them, until it had first been endorsed by the payee named in it, and that they would consequently stand as second endorsers. But the plaintiffs have not put themselves in a situation to review that matter on a writ of error. When the judge submitted this part of the case to the jury, as a question for their consideration, the plaintiffs did not except. On the

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contrary, they seemed to acquiesce; for, instead of excepting, they asked the judge to charge in a particular way in relation to another matter. When he declined charging as they desired on that matter, and gave a different instruction, the plaintiffs excepted. That exception cannot, I think, be fairly construed as extending beyond the matter which immediately preceded it. It does not reach the objection, that the judge left a question to the jury which had not been made by the evidence.

The exceptions to the admission of evidence cannot be maintained. The evidence offered and received, was part of a chain of facts going to make out a good defence. The difficulty was, not that the evidence given was improper, as far as it went, but that it did not go far enough to make out the defendant's case.

I fear the plaintiffs have suffered in their legal rights, but I see no relief on a writ of error. The remedy was, either by a more pointed exception, or a motion in the court below for a new trial.

Judgment affirmed

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THE PEOPLE vs. COGDELL.

Where property, (e. g. a pocket-book containing bank bills,) with no mark about it indicating the owner, was lost, and found in the highway, and there was no evidence to show that the finder, at the time, knew who the owner was; *held*, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterward.

To render the finder of lost property liable as for a larceny, he must know who the owner is, at the time he acquires possession, or have the means of identifying him *instantly*, by marks then about the property which the finder understands. It is not enough that he has general *means of discovering the owner*, by honest diligence, &c.

CERTIORARI to the Orange oyer and terminer. The prisoner, Cogdell, was convicted at the Orange oyer and terminer, October, 1840, (RUGGLES, C. Judge, presiding,) of feloniously stealing, &c. the pocket-book of John War-

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*The People v. Cogdell.*

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ren, and bank bills therein belonging to him, amounting to \$600.

Warren lost his pocket-book on the highway; and the defendant found, and immediately after concealed it, with the bills, fraudulently, and with intent, as the prosecution insisted, to convert the whole to his own use. The evidence was entirely sufficient to warrant the jury in so finding.

The court left the facts to the jury as sufficient to warrant a conviction, and the prisoner's counsel excepted.

*H. G. Wisner*, for defendant.

*C. Borland*, (district attorney,) for the people.

*By the Court*, COWEN, J. There was abundant proof of the concealment and fraudulent conversion of the money, after it had been found. This was undoubtedly under a full consciousness in the prisoner, that it was accidentally lost. It was immediately demanded of him by the owner, who suspected his having found it; but the prisoner denied the finding, and concealed the bills. By the owner's good fortune, they were traced to the hands of the prisoner, and finally restored; but this was after a course of evasion and concealment, plainly indicating his fraudulent intent to keep the money if possible.

It did not appear in evidence, that the pocket-book or money had any mark by which the prisoner could have discovered Warren to be the owner, though he must have been conscious that the owner, whoever he might be, would make an effort to find the money. He did make such effort, offering a reward to the prisoner personally. In short, the loss and finding were purely accidental. Every thing after that, done by the prisoner, was characteristic of the thief; and if he can escape the legal consequences of the conviction of larceny, it must be solely because that crime is not predicable of a taking and conversion under the circumstances mentioned. Singular as it may seem to our reasoning upon principle, this appears to be the settled

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doctrine of the law, and was considered to be so by this court in *The People v. Anderson*, (14 *John. R.* 294.) It is supposed I perceive, by the counsel for the state, that from what was said in *The People v. M'Garren*, (17 *Wendell*, 460,) we may be considered as holding it a duty to disregard the adjudication in *The People v. Anderson*, which is not denied to be a point blank case against the prosecution. But neither the decision, nor any *dictum* in *The People v. M'Garren*, nor the course of reasoning in that case, goes at all to countenance such an expectation. All we asserted there was, that probably the rule must be confined to such a case as the present, where it does not appear that the prisoner knew, or had the means of knowing the true owner; and cases were cited to that effect. One was, where the pocket-book found was legibly marked with the owner's name, the finder being able to read. Such cases themselves imply, that if the owner has placed no mark about the property, and none exists, by which the finder can discover him, the case must still be considered, as it long has been, one of mere trover and conversion—not of larceny. The general remark in *The People v. M'Garren*, that a finder, having the means of discovery, is an exception, must be taken with the limitation indicated by the authorities referred to. Every finder may be said to have the means of discovering the owner by the exercise of an honest diligence; and if, when valuable property is lost, such means be made a test, the doctrine of *The People v. Anderson* is indeed gone. Scarcely any finder could fail in his search; and this being generally obvious to a jury, they would hardly ever fail to convict for that reason. The rule would thus, in practice, be brought down to a very narrow exception.

It may be very difficult to perceive any reason in sound morals, why this should not be so; but that is no argument for disregarding a settled rule of law.

New trial ordered.

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 Lane v. Schermerhorn.
 

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## LANE &amp; GROS. committee, &amp;c. vs. SCHERMERHORN.

An action for money had and received to the use of a lunatic, cannot be maintained in the name of his committee.

Nor can ejectment be maintained in the name of the committee, on the title of the lunatic.

There is no difference, in this respect, between actions relating to the real estate of the lunatic, and those relating to his personal estate.

*It seems*, that the rule as to parties, where a claim of this nature is prosecuted, is the same at law and in equity.

DEMURRER to plea. Declaration, setting out proceedings in the court of chancery, by which the plaintiffs, William Lane and Lawrence Gros, were appointed *the committee of the person and estate of Maria Yates, a lunatic*, on the 6th September, 1837; and then, containing counts for money before that time had and received by the defendant, to the use of the lunatic; and for money before that time lent and advanced by the lunatic, to the defendant. PLEA third, that the said Maria Yates was not then, nor at any of the times mentioned in the declaration, a lunatic, &c. Demurrer and joinder.

*S. Stevens*, for the plaintiffs.

*C. P. Kirkland*, for the defendant.

*By the Court*, BRONSON, J. It is unnecessary to inquire, whether the plea is bad, for the action is misconceived. It should have been brought in the name of the lunatic. In *Petrie and another v. Shoemaker, &c.*, (24 Wendell, 85,) we held, that the committee could not maintain *ejectment* on the title of the lunatic. The authorities on this subject are uniform, that the action must be brought in the name of the lunatic; and there is no distinction between actions concerning the realty, and those relating to the personal estate. The committee is a mere



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Lane v. Schermerhorn.

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bailiff or servant, and the interest and right of action remain in the lunatic. In the case which follows the decision in *Drury v. Fitch*, (*Hutton's R.* 16,) the committee brought trespass, for an injury to the land; but the court said, "that the committee was but as bailiff, and *hath no interest*, but for the profit and benefit of the lunatic, and is as his servant; and it is contrary to the nature of his authority to have an action in his own name, *for the interest and estate, and all power of suits is remaining in the lunatic.*" The same doctrine was laid down in *Fulcher v. Griffin*, (*Popham's R.* 140,) *Coke v. Darston*, (1 *Brownl. & Goldsb.* 197,) and *Knipe v. Palmer*, (2 *Wils.* 130.) In this case it was held, that a lease made by the committee in his own name, was void, and that the lessee was not, therefore, bound by his covenant. (See also, *Matter of Fitzgerald*, 2 *Sch. & Lef.* 431.)

It is true, that most of the cases on this subject relate to the real estate of the lunatic; but that is so because the question was settled at a time when there was comparatively but little personal property, and not because there is any difference in principle between real and personal actions, so far as concerns the right to sue. In both cases the action must, in general, be brought by him who has the legal interest. But the question is settled in relation to personal, as well as real actions. In *Cox v. Dawson*, (*Noy's R.* 27,) which is one of the earliest cases, the committee brought *trover*, and the court said it was ill brought, for he ought to have brought it in the name of the lunatic. Mr. *Shelford* says, the action must be brought in the name of the *non compos*, whether it be an action of trespass, ejectment, *covenant*, or of any other kind. (*Shelf. Lunatics*, 395, *ed.* 1833.) And the rule in relation to parties, seems to be the same in equity, as it is at law. (*Stewart v. Graham*, 19 *Ves.* 312.) That was an application by the committee for a *ne exeat*, on account of a debt alleged to be due the lunatic; and the proceeding was in the name of the lunatic.

Judgment for defendant.

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Moak v. Johnson.

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## MOAK vs. JOHNSON.

Where, in ejectment for dower, the defendant offered B., his landlord, as a witness, and it appeared that B. had leased to the defendant for years, with a covenant for quiet enjoyment; and that B.'s title was a lease in fee from V., containing a like covenant, and reserving rent and a quarter sale; *held*, that B. was incompetent, notwithstanding V.'s covenant to him, his interest preponderating in favor of his tenant.

Under the rule in *Kinney v. Watts*, (14 *Wendell*, 41,) it seems, a lessee, with covenant for quiet enjoyment, not having paid any purchase money, can only recover nominal damages on the covenant, in case of eviction, with the costs, &c. disbursed in defending the title.

Even were that case to be revised, the lessee, it seems, could only be allowed to recover, in addition to the costs, the value of the land from which he has been evicted, as it stood at the date of the covenant, subject to the burthens imposed by the lease.

The possession of the tenant being that of the landlord, in ejectment against the former, the latter is, in general, incompetent as a witness for him.

EJECTMENT for dower, tried at the *Albany* circuit, June 19th, 1841, before CUSHMAN, C. Judge. The facts are sufficiently stated in the opinion of the court.

*McKown & Van Buren*, for defendant.

*G. & R. W. Peckham*, for plaintiff.

*By the Court*, COWEN, J. In February, 1793, Van Rensselaer demised in fee to the witness' father, Henry Burhans, reserving a rent and quarter sale. The father devised to his son David, the witness. The lease from Van Rensselaer contained a covenant for quiet enjoyment; and the lessor is of sufficient ability to make good the indemnity which it implied. The witness demised to the defendant, also with covenant for quiet enjoyment. The last mentioned lease was for a term of years. In ejectment for dower in the land, the witness was offered for the defendant, and was rejected because of interest. Van Rensselaer had notice to defend the suit.

*Prima facie*, the witness was interested in favor of the

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Mosk v. Johnson.

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defendant; and the question is, whether the covenant by Van Rensselaer worked a balance of that interest. This depends on the single inquiry, whether the damages recoverable in an action against Van Rensselaer would necessarily be commensurate with the amount of the witness' responsibility in an action on his covenant, and his loss in other respects. The recovery of the plaintiff in this suit, would take from the defendant specifically one third of the premises demised to him by the witness; thus, *pro tanto*, displacing his title and possession, and the witness' right of entry at the expiration of the term. It would also take in the same proportion from the witness' claim of rent from the defendant. These considerations seem to affect the witness, over and above the question of damages. The recovery by the defendant against the witness, and by him against Van Rensselaer, would, according to the opinion expressed by Mr. Justice Sutherland, in *Kinney v. Watts*, (14 *Wendell*, 38, 41,) be exactly equal. The rule he lays down is this: "As the lessee has paid no purchase money, he can recover none back upon eviction. He is entitled, at most, only to nominal damages." Following out that rule literally, neither the defendant nor the witness could recover more than *one third* of nominal damages. Improvements and rise in value are, of course, not to be considered, according to the opinion cited. They are left to stand on the principle which prevails on a like covenant as between vendor and purchaser, which is well known. To the damages would be added the costs, which the witness would pay to the defendant, and recover in full against Van Rensselaer. So far there would be a balance. But the witness loses his right of entry, and his rent. He comes to maintain his tenant in possession, which is the witness' own possession; (*Jackson, ex dem. Roosevelt, v. Stackhouse*, 1 *Cowen*, 122; *per Tindal, Ch. J., in Doe, ex dem. Bath, v. Clarke*, 3 *Bingham, N. C.* 429;) and although a recovery might not conclude, as between him and the plaintiff, on the point of title, his loss of entry and rent, would probably be of considerable additional consequence. I say, probably. I admit it does not so expressly appear

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**Kerker v. Carter.**

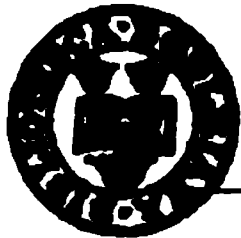
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in the case. *Non constat* they would be of any value ; but we cannot presume such an extraordinary state of things as would make that so. If they were of no consequence, that fact should have been shown, or the witness should have released his rights in this respect.

But if we were to revise the rule laid down in *Kinney v. Watts*, I am satisfied, on reflection, we never could do more than allow, as against Van Rensselaer, the value of the one third in question, as it stood in 1793, subject to rent and quarter sale. The balance then against the witness, would be, the damages for loss of his rent, and right of entry, in respect to an increase of value and improvements, made in the mean time. These two are so strongly probable, from the common course, that we cannot presume against their existence.

In either view, therefore, I am of opinion that the interest of the witness was not equal ; and that a new trial should be denied.

New trial denied.



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**KERKER & WILLETTS vs. CARTER.**

Where, in replevin, the cause was reached at the circuit in its regular order on the calendar, and the defendant refused to appear ; whereupon the plaintiff entered his default, and the cause proceeded, both parties treating it as an inquest. *Held*, on bill of exceptions for the exclusion of evidence proposed by the defendant, that he could not be allowed to change his ground, and claim rights beyond what are incident to an inquest.

On an inquest at the circuit, the defendant may examine the plaintiff's witnesses to controvert the evidence given to sustain the action ; but he cannot, under color of exercising this right, show a substantive defence *aliunde*.

The rule on this point laid down in *Hartness v. Boyd*, (5 *Wend.* 563,) approved, and the previous case of *Green vs. Willis*, (1 *Wend.* 78,) regarded as overruled.

**REPLEVIN**, tried before CUSHMAN, C. Judge, at the Albany circuit, in September, 1839. The cause was reached in its regular order on the calendar ; the defendant was hereupon called, and refused to appear : his default was

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Milk v. Christie.

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entered by the clerk, and the plaintiffs proceeded to take an inquest by default. After a witness had given evidence for the plaintiffs, the defendant's counsel put a question to the witness, *which did not go to controvert the evidence which had been given by the plaintiffs, but went to show a substantive defence aliunde.* The plaintiffs' counsel objected, that such a question could not be put on an *inquest*—the defendant's counsel insisted that it could be put on an *inquest*. The judge decided for the plaintiffs, and overruled the question. The defendant excepted.

*M. T. Reynolds*, for defendant.

*R. W. Peckham*, for plaintiffs.

*By the Court*, BRONSON, J. Although the cause was called in its regular order on the calendar, the defendant refused to appear, and his default was entered. Both parties treated it as an inquest at the time, and the defendant cannot now be allowed to change his ground.

The case of *Green* ads *Willis*, (1 *Wend.* 78,) was virtually overruled by *Hartness* v. *Boyd*, (5 *Wend.* 563,) which we think lays down the true rule, and was properly followed by the judge.

New trial denied.

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### MILK vs. CHRISTIE & TODD.

A middle letter in one's name is no part thereof, and a variance in this respect between a written contract as set forth in the pleadings, and that produced in evidence, is immaterial.

A contract to deliver 1000 "*bushels of good merchantable wheat*," &c., is complied with by the vendor's tendering a quantity of wheat, merchantable in fact, and equal in the aggregate to 1000 bushels *statute weight*, though it will not fill the *statute measure* of eight gallons to the bushel.

In general, the term *bushel* in a contract, calls for a quantity equal to eight gallons; but in respect to wheat, rye and Indian corn, there is an exception; and in sales of these, the term *bushel* is satisfied by a quantity equal in *weight* alone to the *statute* requisition, unless the parties have otherwise agreed.

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**ASSUMPSIT**, for not accepting a quantity of wheat, tried at the Tompkins circuit, February 12th, 1840, before MONELL, C. Judge. The declaration contained a count upon the special contract, and also counts for goods sold and delivered.

The plaintiff gave in evidence a contract in writing, dated September 27, 1838, by which he contracted to sell to the defendants "one thousand bushels of good merchantable wheat, at the price of two dollars per bushel, to be delivered at said Christie & Todd's mill, on or before the 15th day of October next, and cash payable on delivery of each load as it may be delivered." The contract then declared what portion might be spring and what winter wheat, and provided for settling any dispute as to such proportion. By these provisions, one-sixth of four hundred bushels might be spring wheat; and if any of the other six hundred bushels should be spring wheat, the latter was to go into the contract at fifteen shillings per bushel. The defendants agreed to accept and pay, on the above terms.

It was doubtful, on the face of the contract, whether the signature of the plaintiff was Wm. H. Milk or Wm. W. Milk. On its being offered in evidence, the defendants' counsel objected for variance, because the contract was described in the declaration as signed Wm. H. Milk; but the objection was overruled. The plaintiff's real name was Wm. W.

The plaintiff then gave evidence tending to prove a tender of the wheat, according to the terms of the contract, the wheat being in fact merchantable, and equal in the aggregate to 1000 bushels at the statute weight. But many particular bushels, taking it at eight gallons per bushel, the statute measure, would not reach the statute weight, of sixty pounds per bushel. The defendants expressed a willingness to receive all the wheat tendered, which was clean and weighed sixty pounds to the bushel measure; but declined to receive any which weighed less, as not coming up to the contract.

The judge, at first, thought the contract to mean mer-

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chantable wheat, weighing 1000 bushels in the aggregate; and considerable evidence was therefore received on the question of merchantable quality, independently of the measure for each particular bushel.

The defendants had received some of the wheat; and had not declined to receive any which weighed sixty pounds to the bushel.

The witnesses for the plaintiff, and defendants, expressed different opinions as to the meaning of the words merchantable wheat; those for the plaintiff saying, that weighing sixty pounds to the bushel was not essential; those for the defendants, that it was; several, on both sides, being either millers, or otherwise experienced dealers in the article.

The judge charged the jury, that the plaintiff was bound to prove, that he had delivered, or offered to deliver, at the defendants' mill, within the time stipulated, one thousand bushels of wheat of the kind and quality mentioned in the contract, and not of an inferior quality. "That a bushel of good merchantable wheat, according to the revised statutes relative to the standard of weights and measures and the revisers' note, shall contain at the mean pressure of the atmosphere, at the level of the sea, eighty pounds of distilled water, at its maximum density, which, by law, is equal to eight gallons, or thirty-two quarts; and that the bushel of wheat shall consist of sixty pounds. In other words, *that good and merchantable wheat, must weigh sixty pounds to the bushel.* He was of a different opinion before examining the statute, and the revisers' note, supposing *that if the purchaser got his sixty pounds of wheat, which was of a fair quality* in other respects, it was of no consequence as to the bulk or measurement. But he now felt constrained to give the statute a different construction, and one which, if correct, would call for the intervention of the legislature; for not one crop in twenty in this state will now weigh sixty pounds per bushel. If the jury are of opinion that the wheat tendered was good merchantable wheat, within the construction given by the court, they will find a verdict for the plaintiff, for such damages as they find the differ

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ence to be between the price to be given and the cash price of such wheat on the day of completing the contract." But if of a different opinion, they would find for the defendants.

The jury found for the plaintiff with \$222,65 damages.

The defendants' counsel moved for a new trial on a case.

*S. Love*, for the defendants.

*C. Humphrey*, for the plaintiff.

*By the Court*, COWEN, J. The middle letter was no part of the name; and was, therefore, properly rejected as surplusage, both in the pleadings and evidence. The name then stood in both William Milk. (*Franklin v. Talmadge*, 5 John. R. 84.) Again, the case may be put in this way: William W. sues by the name of William H.; and the misnomer is not pleaded in abatement. It is then enough to see, that the true contract produced in evidence was in fact made with the real plaintiff, by whatever name. (*Waterbury v. Mather*, 16 Wendell, 611, 612 to 615, and the authorities there cited.)

Under the charge of the judge, the jury must be understood as having found that the wheat tendered was merchantable, within the sense of that word as understood by the plaintiff's witnesses, at least; and if the construction of the statute, contended for by the plaintiff's counsel, be correct, we cannot interfere with the verdict. Whether the wheat came within that construction, was a question fairly open for the jury upon the evidence, and was fairly submitted; and we must take it, on their finding, that the wheat was merchantable, unless the statute requires, upon such a contract as the one before us, that merchantable wheat should combine, in each several bushel, both the measure and weight required by the statute. The jury either repudiated this construction, thus, if the defendants



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be right, finding against law; or they adopted it, and thus found against the weight of the evidence.

The defendants acted throughout upon a very narrow and inconvenient, not to say an unjust construction of the contract, obviously with the view to get rid of what turned out to be a hard bargain. Yet they are entitled to be discharged from the contract, if the statute be so strict as the learned judge supposed. The provisions to which he referred are 1 *R. S.* 618, § 19, and *Id.* 621, § 40, 2d ed. Section 19 declares, that "The bushel shall contain at the mean pressure of the atmosphere, at the level of the sea, eighty pounds of distilled water, at its maximum density." Section 40, that "Whenever wheat, rye or Indian corn, shall be sold by the bushel, and no special agreement as to the measurement or weight thereof shall be made by the parties, the bushel shall consist of sixty pounds of wheat, and of fifty-six pounds of rye or Indian corn." The last section, standing alone, is obviously satisfied by mere weight. Wheat, otherwise merchantable, weighing sixty pounds, makes one bushel, and a greater or less quantity makes bushels or parts of bushels, while rye and corn would be weighed, calling fifty-six pounds of either, one bushel. Such is the ordinary course among dealers. But it is supposed that the last section must be read with the previous 19th; thus combining precise measure, as well as weight; in other words, that to make a bushel, it must not only be of the prescribed weight required by the 40th section, but must also precisely fill the measure required by the 19th. We think otherwise. The 19th, section, the 14th, and others of a similar character, in the statute concerning weights and measures, (1 *R. S.* 616, 2d ed.) relate to the size or capacity of standard measures, deposited in the office of state. These are to be copied, distributed and authenticated, for the use of such as deal in measure simply. A contract expressing measure would, accordingly, mean the statute capacity; not weight. But the 40th section comes in and makes wheat, rye and corn exceptions. As to these, though the sale be expressed in *bushels*, a term for dry

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measure, it shall be construed to mean *weight* simply. We are referred, by the defendants' counsel, to the remarks of Professor Renwick, as adopted by the revisers. (3 R. S. 545, 2d ed. pl. 4.) But nothing there said is calculated to raise the construction on the statute, for which the defendants contend. He is there treating of dry measure. His remarks regard *capacity*, not *weight*. No reference is made to the provision in the 40th section, by which the word bushel, in the peculiar case of wheat, rye and corn, is made *prima facie* a term of weight, and not of measure.

On the whole, we cannot bring ourselves to doubt, that the legislature intended, by the 40th section, simply to enact what had long been the universal practice of dealers, in the peculiar kind of grain there mentioned, under contracts of sale by the bushel. It was thought very inconvenient to make the word *bushel*, in contracts between them, conform to the general meaning affixed to it as a mere measure of capacity. The section was passed in affirmance, not in reversal of commercial language, as every merchant, probably every agriculturist, in the state, have long understood it. Both section 19, and the recommendation of Professor Renwick, standing in the form of an unqualified statute, would have departed from common parlance in respect to three kinds of grain. Section 40 introduced the proper qualification.

We are of opinion that the motion for a new trial must be denied.

New trial denied.

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KLOCK vs. CRONKHITE.

Where the assignee of a mortgage takes a quit claim deed of one *half* of the mortgaged premises, this does not extinguish the mortgage. At most, it can only operate an extinguishment of a *part* of the mortgage debt, leaving the assignee at liberty to foreclose for the residue.

It will make no difference in such case, that the assignee's title to such half is derived from one who had purchased it of the mortgagor, and gave back an agreement to pay off the mortgage; especially if the assignee had no

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notice of the agreement. And, *semble*, even were he notified, the result would be the same.

*Quere*, whether if the assignee's deed, instead of being for *half*, had covered the *whole* premises, it could have operated an extinguishment of the mortgage.

Where one, in a mortgage foreclosure under the statute, through an honest mistake of his legal rights, claims in his notice more than is due him, this will not affect the validity of the sale. And *quere*, whether such erroneous claim could, under any circumstances, prevent the purchaser from acquiring a good title.

E. having a judgment, obtained in 1832, which was a lien on premises covered by a prior mortgage dated in 1829, caused the same to be levied on and sold, and bid them in himself. After the sale became absolute, he obtained the sheriff's deed, and the mortgage was foreclosed under the statute. *Held*, that E. acquired no title under the judgment, and of course could convey none to the defendant, his grantee.

A sheriff's deed, given after the sale becomes absolute, takes effect by relation from the time when it might have been demanded. *Semble*.

EJECTMENT, for nine acres of land, in Minden, Montgomery county, tried at the Montgomery circuit, before WILLARD, C. Judge, in November, 1839.

*John Baum* and *Abram Baum*, being seized of the premises in question, on the first day of May, 1839, mortgaged the same to *Peter Davis*, to secure the payment of \$600, with interest. On the 18th January, 1834, J. and A. Baum, the mortgagors, conveyed the *south half* of the premises to *Sanford W. Lee* and *Simeon Klock*, who thereupon gave the Baums a written undertaking "to have the *north* part of the lot cleared from the mortgage, and pay the mortgage and interest from the first day of May next." On the 7th April, 1834, Davis assigned his mortgage to the plaintiff. On the 7th November, 1834, Lee and Klock conveyed the *south half* of the premises to the plaintiff, by quit claim deed. But it did not appear, that the plaintiff had notice of the agreement of his grantors to pay off the mortgage. The plaintiff foreclosed the mortgage, by notice pursuant to the statute, and became the purchaser of the whole of the mortgaged premises, at the sale, on the second Monday of May, 1836.

On the 15th October, 1832, *Isaac Elwood* recovered a judgment for \$2000 of debt, and \$10 costs, against J. & A.

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Daum, the mortgagors, under which the premises were sold to Elwood on the 8th November, 1834, and a deed was executed to him by the sheriff, on the 23d May, 1836. Elwood had previously, on the 20th February, 1836, conveyed the premises to the defendant, by warranty deed. When the plaintiff commenced advertising to foreclose the mortgage, the amount then unpaid of the mortgage money was \$237,70, and the plaintiff in the notice claimed that sum as being due on the mortgage.

The defendant insisted, 1st. That as the plaintiff had purchased the south half of the mortgaged premises in fee, the mortgage was merged and the power of sale at an end, and that the foreclosure was therefore irregular and void; 2d. That if the power of sale was not wholly gone, it was irregular for the plaintiff to claim the whole sum due on the mortgage; and 3d. That the foreclosure was irregular and void as against Elwood, a judgment creditor, and as against any person holding under that judgment. The judge decided that the plaintiff was entitled to recover, and the defendant excepted. Verdict for the plaintiff. The defendant now moves for a new trial on a bill of exceptions.

*D. Cady*, for defendant.

*M. T. Reynolds*, for plaintiff.

*By the Court*, BRONSON, J. If there had been notice to the plaintiff of the agreement of Lee and Klock to pay off the mortgage, I do not see how that could prejudice the plaintiff's title in a court of law. But as he had no notice of the agreement, it is quite clear that he cannot be affected by it.

After taking an assignment of the mortgage, the plaintiff acquired the equity of redemption, as to the south *half* of the premises, by the deed from Lee and Klock. If that had been a conveyance of the *whole* of the property, I should not be prepared to say that the mortgage was extinguished. But however that may be, taking a conveyance of the equity of redemption as to only one half of

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the property, could, at the most, only operate to extinguish one half, or some other portion, of the mortgage debt; and the plaintiff might well foreclose and sell for the residue.

When there is a foreclosure under the statute, the notice must specify, among other things, the amount claimed to be due on the mortgage at the time of the first publication. (2 R. S. 546, § 4.) But the statute imposes no penalty for claiming more than is really due; and if such a claim could, under any circumstances, affect the validity of the sale, it certainly could not in a case like this, where, if the plaintiff has in fact demanded too much, it has not resulted from a fraudulent purpose, but from a mistake concerning his legal rights.

Under the act of 1813, a foreclosure by advertisement and sale does not prejudice any creditor, to whom the mortgaged premises are bound by a judgment at law, or a decree in equity. (1 R. L. 373, 374, § 5, *first proviso*.) But Elwood did not stand in the character of a judgment creditor, having a lien at the time of the mortgage sale. He had previously sold under his judgment, and his right to a deed from the sheriff had become perfect on the 8th of February, 1836, when the time allowed for redeeming expired; although the conveyance was not made until the 23d of May, 1836, which was after the mortgage sale, the deed undoubtedly took effect, by relation, from the time when it might have been demanded, which was prior to the sale on the mortgage. At the time of that sale, Elwood stood in the character of grantee or assignee of the mortgagors, and as such he was foreclosed of all equity of redemption. The statute has no saving clause in favor of those who have acquired the title or equity of redemption of the mortgagor; it only saves other mortgagees, and creditors having a lien by judgment or decree.

Elwood must claim in one of two ways, and not in both. He must say, either that he was the owner of the equity of redemption at the time of the mortgage sale; or that he was a judgment creditor having a lien. If he claims the

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equity of redemption, the answer is, that that interest has been foreclosed; if he claims merely as a judgment creditor having a lien, he must then go into equity and redeem. He clearly has no title at law.

The defendant has of course acquired only such rights as belonged to Elwood, his grantor. The cause was properly disposed of at the circuit.

New trial denied.

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B. WALDRON and SALLY ANN his wife *vs.* MARY C. P. McCOMB.

Where a naked power to sell lands was given by will, accompanied by a direction, that the *moneys arising from the sale should be invested, &c.* for the purposes of the will: *Held*, that according to the obvious import of the power, the sale must be for *cash*, or something which could be invested; and a deed under it, reciting facts which showed that the grantor conveyed partly for money, and partly in consideration of an equitable claim of the grantee, was held a departure from its purpose, and therefore void.

A naked power to sell must be pursued, both in respect to its purposes or object, and the forms prescribed in it; and, *semble*, a deed under it, exhibiting a defect in either particular, is void, both at law and in equity.

So, *semble*, in respect to sales under powers of a public nature; e. g., by collectors of taxes, or executors or administrators in virtue of a surrogate's decree for the payment of debts, &c.

EJECTMENT, tried before RUGGLES, C. Judge, November 12, 1839, at the Westchester circuit. The case was this: In May, 1799, Joseph Eden, being seized in fee of the premises in question under the will of Medcef Eden the elder, subject to an executory devise over to Medcef Eden the younger, in fee absolute, in the event of said Joseph dying without issue before said Medcef the younger, executed a deed of said premises, in fee, to Alexander McComb. The defendant claimed under this deed. But, in 1826, it being discovered that her title was defective, on account of the executory devise over to said Medcef the younger, which had attached by the death of said Joseph without issue, an attempt was made to remedy the defect, as follows:

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Medcef the younger had made his will in 1819, devising all his real and personal estate to Rachel, his wife, for life, or *durante viduitate*, for the maintenance and support of herself, her daughter Sally Ann, (one of the plaintiffs,) Elizabeth and Rebecca, and also of John Pelatreau; and on the death or marriage of his wife, he devised said estates to said John Pelatreau during his natural life, for the support of himself and the said three girls; and after the death or marriage of his wife, and the death of Pelatreau, he devised all his said landed estates to *Sally Ann*, Elizabeth and Rebecca, in fee. He gave to his said wife, so long as she should remain single, and to said Pelatreau, after her death, or marriage, power to sell and convey any part of his real estate, provided Aaron Burr should, in writing, signed by his hand, consent; no sale to be valid without such consent; *the moneys arising from such sale to be invested under the direction of said Aaron Burr, for the purposes of said will*. He appointed his wife executrix, so long as she remained single and unmarried and declared, that afterwards, said Pelatreau should be his executor.

In 1826, Medcef the younger being dead, and his will duly proved, said Rachel, the widow of Medcef the younger, with consent of said Aaron Burr, signified by his signing, &c. conveyed the premises in question to James Renwick, in trust, for the defendant Mary C. P. McComb. The deed recited, that said Medcef the elder had, April 1st, 1787, demised the premises in question to M. Wattles for ten years; that Wattles assigned to D. Halsey; that, April 1st, 1789, by articles reciting said lease and assignment, said Medcef the elder covenanted with said Halsey, that if he should pay to said Medcef the elder £1000, with interest at the end of eight years from the date of said articles, then said Medcef the elder, his heirs, &c. should convey in fee simple; that by sundry assignments, Halsey's interest had become vested in Alexander McComb. Then, after reciting the will of Medcef the elder, the devisees to said Joseph and Medcef the younger, the death of said Medcef the elder, the payment of the £1000, and

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interest, by Alexander McComb to said Joseph, and Joseph's said deed, in fee, to Alexander McComb, it proceeded further to recite, that all the estate of said Alexander McComb had become vested in said Renwick and M. C. P. McComb, the defendant: that said Joseph died without issue, said Medcef the younger surviving. It also recited parts of the will of said Medcef the younger, and the said power of sale, and then proceeded thus: "Now this indenture witnesseth, that the said Rachael Eden, widow, &c. in consideration of \$750, &c. to her in hand paid, &c. and by virtue of the power, &c. and with the approbation, &c. of the said Aaron Burr, &c. hath granted, bargained, &c. and hereby doth, &c. unto the said Renwick, &c. and all the estate, &c. of the said Medcef the younger," &c. in fee. Signed and sealed by Rachael Eden and A. Burr.

The plaintiff called one Berrien as a witness, who stated, that the premises in question were, in 1826, worth \$4000 or \$5000.

It was also proved, in the course of the trial that, Elizabeth having previously died without issue, said Rebecca, in 1834, conveyed her interest to the plaintiff, Benjamin Waldron.

The plaintiffs' counsel insisted at the trial, that the said deed of Rachael Eden was not sufficient to convey a title under the will of said Medcef the younger; that it was not a valid execution of the power therein contained; that, on account of the *gross inadequacy of the consideration*, and *the matter contained in the recitals thereof*, it was void in law. But the judge decided and charged the jury that, upon the evidence given, the defendant was entitled to a verdict. The plaintiffs' counsel excepted, and the verdict being for the defendant, the plaintiffs' counsel now moved for a new trial on a bill of exceptions.

*A. L. Jordan*, for the plaintiffs.

*J. L. Wendell*, for the defendant.



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*By the Court*, COWEN, J. It is impossible to say, after reading the recital of the facts in the deed from Rachael Eden to Renwick, that the \$750 mentioned as the purchase money, formed the sole consideration of that deed. No one can doubt, that the supposed equitable claim of the defendant, arising out of the covenant by Medcef Eden the elder to convey, and the payment of the purchase money to Joseph Eden, made a part of the consideration. The material question therefore is, whether the power in the will of Medcef Eden the younger has been followed. Several cases were cited on the argument, to show the strictness with which the formal requisites of powers like the present must be followed. These may be laid out of view, except in so far as they can be supposed to bear on the question in principle; for there is no dispute that all formal requisites required by the power have been complied with.

The great objection is, that the power has not been pursued in its spirit, which, it is said, required a sale simply for a pecuniary consideration—for moneys, or, at least, their equivalent; inasmuch as the power looks expressly to the whole consideration of the sales being invested for the purposes of the will. That the power intended this, cannot be disguised nor that such intent has been departed from, by the execution of the deed, in part on a different consideration. The power was a naked one. The grantor had no title of her own in trust, or otherwise. It contains substantially a direction to sell for cash, or its equivalent—something which may be invested. It is like a power to demise on the ancient rent: a demise for less, in such case, will be void. There can be no difference between the rule at law or in equity. If a naked power be not pursued, the deed is void. The cases cited on the argument, of deeds from collectors of taxes, are familiar instances. *Clarke's Lessee v. Courtney*, (5 Peters, 319, 347,) will be found an authority to guide us in the construction of a power like this—i. e. a naked power. There, the sale was held void at law. *Taylor v. Galloway*, (1 Ham. Ohio R. 232,) in one

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of its branches, is precisely in point, both as to construction, and the effect of making a grant under a testamentary power of this kind, for a consideration different from what was contemplated by the will. The sale was held void in equity. So, a naked statute power to sell for the payment of the debts due from a testator, or intestate, will not warrant any sale, with an object different from the raising of money, and the payment of debts. (*Bridgewater v. Brookfield*, 3 Cowen, 299.) (a)

Not only must the forms required by such powers be followed, but their purpose; and if a defect, in either respect, appear on the face of the deed, it is void, not only in equity, but at law also.

A contrary doctrine, applied to cases like the one at bar, would enable persons, having powers of sale under last wills, to sacrifice the rights of devisees, by merely surmising some equitable consideration by way of recital; for, the attempt to establish such a consideration was not here made at the trial, independently of the recitals. Surely the testator never intended that the donee of the power should have authority to bind his estate by recitals, even if she could take actually outstanding claims into the account. But she could not.

If there be any claim by the defendant, capable of being enforced in a court of chancery, she must go to that tribunal, where her equity may be considered on the proper allegations and proofs.

It is not necessary to say, whether we have power, at law, to notice the question raised on the inadequacy of the pecuniary consideration. We are of opinion that the deed was void for the reasons given, independently of the objection that, in 1826, \$750 was grossly inadequate to the real value, as proved by Berrien.

New trial granted.

(a) In respect to the requisites of deeds, given under powers of a public nature, as well as the mode of proving them, see the cases cited in *Cowen & Hill's Notes to 1 Phill. Ev.*, pp. 868, 1288, et seq.

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Payne v. Ladue.

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PAYNE vs. LADUE.

A note cannot be contradicted or controlled in its legal effect, by oral evidence that it was to have no validity except in a certain event.

Upon the settlement of a slander suit brought by L. against P., the latter gave up certain notes against the former, discontinued certain suits, and agreed to sign a retraction of the slander; and L., in consideration thereof, executed to P. a note, which he delivered to P. on condition that, it was to be returned if the retraction was not signed, and to have no validity till then: *Held*, that though P. failed to sign the retraction, the note was not void, and he might maintain an action upon it.

*Semble*, that had the settlement of the slander suit constituted the *sole* consideration for L.'s note, P.'s failure to sign might have operated as a defence, on the principle of showing want or failure of consideration.

But where, as in this case, the consideration is composed of several things, and the defendant has received a part of it, the only way in which complete justice can be done, is by leaving each party to his action.

Whether the failure of P. to sign, could come in to affect the amount of damages, *quere*.

Where the defendant insists at the circuit, that the facts proved by him, constitute an entire bar to the action, and, being overruled by the judge, excepts; he cannot, under such an exception, raise the question at bar, whether the facts ought not to have gone in mitigation of damages.

ASSUMPSIT, tried at the Albany circuit, in December, 1839, before CUSHMAN, C. Judge. The action was on a note, dated Oct. 24, 1837, by which the defendant, "for value received," promised to pay the plaintiff \$110, in leather to be delivered on demand in Albany. The leather had been demanded, and the defendant refused to pay, on the ground that the note was void.

The case was this: At the time of giving the note, there were three suits pending between the parties, two in favor of the plaintiff against the defendant, and one in favor of the defendant against the plaintiff: the latter was for slander. The plaintiff also held two notes against the defendant, amounting to \$220. The parties met and agreed on a settlement. All the suits were to be discontinued; the plaintiff was to give up his two notes, and to sign a retraction of the slanderous words; and the defendant was to give his note for \$110, payable in leather. The note in

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question was thereupon made by the defendant, and delivered to the plaintiff; all of the suits were discontinued, and the parties executed mutual receipts of all demands. The two notes which the plaintiff held against the defendant, were not then delivered up, but were afterwards delivered to, and accepted by the defendant. At the time of the settlement, a written retraction of the slanderous charge was prepared to be signed by the plaintiff. He said he would sign it, but wanted first to see his brother. According to the testimony of one witness, the plaintiff said, if he did not sign the recantation, he would return the defendant's note; and the witness added, the note was to have *no validity* as a note, until the paper was signed—that *the condition* on which the plaintiff was permitted to take the note, was, that he should return it unless he signed the recantation. The defendant refused to pay the note, because the retraction had not been made. He insisted that the facts proved constituted a bar to the action. The judge charged the contrary, and the defendant excepted. Verdict for plaintiff. The defendant now moves for a new trial on a bill of exceptions.

*S. Stevens*, for defendant.

*J. Holmes*, for plaintiff.

*By the Court*, BRONSON, J. The note could not be contradicted, nor could its legal effect be controlled, by oral evidence, that it was to have no validity except in a certain event. (*Erwin v. Saunders*, 1 Cowen, 249, and cases there cited.)

But I think the facts proved, might, under certain circumstances, amount to a defence, by way of showing a want or failure of consideration. If the note had been given upon the *sole* consideration that the plaintiff should sign a retraction of the slander, or do some other act, which had not been performed, I see no reason why that matter should not be set up as a defence. But here there has only been

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a *partial* failure of the consideration. The plaintiff discontinued his two suits, and gave up two notes against the defendant, amounting to \$220. The defendant has had a *part*, at least, of the consideration on which the note was given, and he is not, therefore, at liberty to say the note is wholly void. In such cases, each party may have an action. That is the only way in which complete justice can be done to both. (*See 1 Saund. 320, note 4. Tompkins v. Elliot, 5 Wend. 496. Betts v. Perine, 14 Wend. 219.*) It is unnecessary to consider whether the facts proved, could properly go to the amount of damages, as no such question was made on the trial. The defendant insisted that the action was wholly barred, and that is the only point on which the judge passed.

New trial denied.

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HORTON vs. HENDERSHOT.

Where the plaintiff and defendant, being constables, had each levied on the same property, pursuant to attachments in favor of different creditors, regular on their face, but really void as against the respective parties who procured them because of having issued on defective affidavits: *held*, that though the plaintiff levied first, and had taken possession, he could not maintain trespass *de bonis* against the defendant for a subsequent levy and taking under his attachment.

It can make no difference, in such case, that the defendant stands indemnified by the persons under whose process he acted.

Had the party whose property was taken sued either officer, the process would have been a defence.

And had the creditor, in the attachment under which the plaintiff acted, sued him, because of the loss of the property, the want of jurisdiction would have been a defence.

The rule justifying an officer acting under process apparently regular, but really void as to the party, for want of jurisdiction, is one of *protection* merely. The officer may defend under such process, but he cannot build up a title upon it, so as to maintain actions against third persons.

A motion for a new trial, *on a case*, will be denied, *it seems*, irrespective of the ground on which the cause was disposed of at the circuit, if the court see that another exists which *must* ultimately prove fatal to the party moving: otherwise, where the question arises on *bill of exceptions*.

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**TRESPASS *de bonis asportatis***, tried at the Tompkins circuit in February, 1839, before MONELL, C. Judge. Both parties are constables, and both sought to make title to the possession of the property, under several attachments issued by justices of the peace, in favor of several individuals, against one Edwin Dart. The plaintiff made the first levy, and took the property into his possession; and for the subsequent taking by the defendant, this action was brought. All of the attachments were regular upon their face, so as to afford a sufficient protection to the officers who served them; but in relation to the parties in whose favor they issued, all the attachments on both sides were void, because the affidavits on which they issued did not show enough to give the justices who issued them, jurisdiction to proceed in that manner. A verdict having passed for the defendant, the plaintiff now moves for a new trial on a case.

*G. D. Beers*, for plaintiff.

*B. Johnson*, for defendant.

*By the Court*, BRONSON, J. Both of these officers have acted under attachments, which, though void as to the parties in whose favor they issued, were regular upon their face, and without any apparent defect of jurisdiction on the part of the justices who issued them. The plaintiff levied first, and the defendant took the property out of his possession. Can the plaintiff maintain trespass for that taking? The case of *Earl v. Camp*, (16 *Wendell*, 562,) answers the question against him. The rule which justifies the officer, when acting under such process as I have mentioned, is one of protection—not of assault. It is a shield, but not a sword. The officer, when sued, may defend under such process, but he cannot build up a title upon it, which will enable him to maintain actions against third persons.(a)

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(a) The same distinction was adverted to, in a general way, by Shaw, C. J. in *Sturbridge v. Winslow*, (21 *Pick.* 83, 87.)

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The defendant, in this case, stands simply in the attitude of defence. He claims nothing but that protection which process, apparently regular, affords to the officer who serves it. The plaintiff goes beyond that, and seeks to build up a title upon the process in his hands. He has not been sued, nor is he in any peril of suffering damage. If Dart sues him, the process will be a sufficient defence.(b) If the plaintiffs in the process sue, because the property has been lost, the officer may answer, that their process was void. (*Earl v. Camp, supra.*)(c) In short, the plaintiff is not acting on the defensive, but is suing for the benefit of persons who could not maintain actions in their own names.

The fact that the defendant was indemnified by the persons under whose process he acted, cannot alter the case. Taking an indemnity, does not deprive the officer of the protection which his process affords.

The case was put upon other grounds at the circuit; but as the one I have mentioned leads to the same result, there can be no use in granting a new trial. This is a *case*—not a bill of exceptions.

New trial denied.

(b) See the cases cited in *Cowen & Hill's Notes to 1 Phill. Ev. pp. 990, 1005, et seq. and 1078*: Also, *Roberts v. Tennell*, (4 *Litt. R.* 286, 288;) *Sturbridge v Winslow*, (21 *Pick. R.* 83;) *Isaacs v. Champlin*, (1 *Bail. R.* 411;) and *Countess of Rutland's case*, (6 *Coke's R.* 53, 54.)

(c) In addition to the cases referred to by Cowen, J. in *Earl v. Camp*, (16 *Wendell*, 567, 8,) see *Aiken v. Moore*, (1 *Hill's (So. Car.) R.* 432;) also *Countess of Rutland's case*, (6 *Coke's R.* 53, 54.) The officer, however, could not be allowed to answer that the process was irregular merely. (*Harvey v. Huggins*, 2 *Bail. R.* 252. *Walden v. Davison*, 15 *Wendell*, 575. *The People v. Dunning* 1 *id.* 16.)

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 Gillett v. Stanley.
 

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## GILLETT and others vs. STANLEY.

A deed of lands by an infant is *voidable* merely—not *void*.

But such deed, executed by a *feme covert*, without her husband, and not acknowledged by her on a separate examination, &c as required by the statute, is absolutely void.

The act of 1809, declaring certain deeds by *Indian heirs* valid, if executed with the approbation of the surveyor general, was not intended to affect either of the above disabilities; and hence, a deed by an Indian heir, though made with the surveyor general's approbation, is open to the same objections, on the ground of the *infancy* or *coverture* of the grantor, as deeds executed by others.

The *insolvent act* of 1811 was not wholly void, but only so as to a part of the creditors designed to be affected by it; and if a discharge under it was valid, when made, as against any of the insolvent's creditors, it does not lie with him to allege, as against a title derived through the assignment, that the latter was inoperative.

The officer conducting insolvent proceedings under that act, had power to appoint a new assignee, as well *after* the assignment was executed as *before*, provided a vacancy existed arising from one of the causes specified in the second section.

A certificate of the probate of a deed, under 1 R. L. 369, § 1, should show expressly that the person who testified to the fact of execution was a subscribing witness. That his name is identical with one appearing in the attestation clause is not enough.

And a certificate stating, that the witness testified to the grantor's having *executed the deed*, without indicating how the witness came to know the fact, is insufficient. *Seem*, it should show, either that the witness saw the execution, or heard it acknowledged when he subscribed.

A deed of lands by assignees of an insolvent, appointed under the act of 1811, is invalid unless executed by a *majority*.

If a defendant in ejectment sets up that he is tenant in common with the plaintiff, with a view of putting the latter to proof of an ouster, he must connect himself with the title under which the plaintiff claims.

But he may show title out of the plaintiff, and thus defeat the action, without connecting himself with it.

A declaration in ejectment, alleging a *joint* title in several, is not supported by proving title in *some* of them.

Nor will a title in *two surviving assignees* of an insolvent, support a count averring title in *one*.

And if the title is in A., as surviving assignee, it is wrong to describe him as *one of the surviving assignees*: but a trifling misdescription like this may be disregarded at the circuit, and is curable by subsequent amendment.

Under a declaration claiming the *whole interest* in certain premises, the plaintiff cannot recover an undivided share.



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The plaintiff, on obtaining a new trial in ejectment, was allowed to amend his declaration, so as to conform it to his title as appearing on the former trial.

EJECTMENT, to recover lot No. 24, in Junius, now Tyre, Seneca county, containing 600 acres, tried before MOSELEY, C. Judge, at the Seneca circuit, in May, 1838. The first count alleged a title in fee in Zacheus P. Gillett, and Isaac Norton and William H. Jacacks, *surviving assignees* of the said Zacheus P. Gillett. The second count was on the title of Gillett; the third, on the title of Isaac Norton, one of the surviving assignees of Gillett; and the fourth count, on the title of William S. Jacacks, one of the surviving assignees of Gillett.

The plaintiffs gave in evidence a patent dated 29th January, 1791, granting this and two other lots in fee to Captain John Otaawighton, an Indian, in pursuance of the act in relation to military bounty lands. Also, a deed in fee to Gillett for the same lots, dated August 17, 1809, from Susannah, relict, and Moses, Abraham, Isaac, Thomas, Elizabeth and Catharine, children of Captain John, (as he was usually called,) the patentee. The deed had been acknowledged and recorded; and a certificate of the approbation of the surveyor general was endorsed upon it, the 26th April, 1810. It was proved, that the persons who executed the deed were the widow and children of Captain John, the patentee, who had died before that time. One or two of the sons were infants at the time the deed was executed; and one or both of the daughters were then *femes covert*.

The defendant gave in evidence a discharge of Gillett as an insolvent debtor, under the act of April 3, 1811, granted by the recorder of the city of Albany, on the 18th April, 1812; and secondary evidence was given tending to show that Gillett had, on that occasion, executed an assignment of all his estate, real and personal, pursuant to the statute. The assignees named by the recorder, in his order for the assignment, were William S. Jacacks, Ephraim Mandeli and Isaac Norton; and two of those persons, Jacacks and

Mandel, certified to the recorder that the assignment had been executed. Evidence was also given tending to show that Jacacks, about the time the assignment was executed, left Albany and went to New-York; and that the recorder, soon afterwards, appointed Eldad Goodwin an assignee in the place of Jacacks.

The defendant also gave in evidence the record of a deed, dated July 29, 1822, from Ephraim Mandell and Eldad Goodwin, assignees of Zacheus P. Gillett, an insolvent debtor, conveying all the right and title of Gillett to several military lots, including the lot in question in this suit, to Justus Wright. Thaddeus Dann and another person appeared to be subscribing witnesses to the deed. The certificate of the commissioner, of the acknowledgment and proof of this deed, was as follows—"On the 19th day of August, 1822, came before me Ephraim Mandell, to me known, and Thaddeus Dann, to me not known, but who was identified by the testimony on oath of Elihu Lewis, to me known; and the said Ephraim Mandell, the person described in the within deed, acknowledged that he had executed the same; and the said Thaddeus Dann being duly sworn, testified that he knew the within Eldad Goodwin, and that the said Eldad Goodwin duly executed the within deed. I therefore allow the within deed to be recorded." The deed was recorded in Seneca county, the 11th October, 1822.

Mandell, one of the assignees, died in 1828; Goodwin died in 1829 or 1830; and Jacacks died in February, 1838. The declaration was of January term, 1837.

Several questions were made and decided in the course of the trial in relation to the evidence, which are sufficiently stated in the opinion of the court. The judge, among other things, charged the jury, in substance, that as to such of the grantors, if any, in the deed to Gillett, as were *married women* at the time, a conveyance executed by them and approved by the surveyor general, as the statute directs, would pass their title; but if any of the grantors were *infants* at the time, the deed as to them was void. That the

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power of the recorder to substitute an assignee in the place of one originally named, was limited to the time before the assignment made; and if Goodwin was substituted after Jacacks had accepted the assignment, the appointment of Goodwin was void. That the execution of the deed from Mandell and Goodwin to Wright, was sufficiently proved. That if the deed from the Indian heirs to Gillett was inoperative as to any of the grantors on account of their being infants, then the defendant is to be deemed in possession under such infants, as tenants in common with the owner of the other shares, and that one tenant in common cannot maintain ejectment against another without proving an ouster; and although the defendant showed no claim of title in himself, he could show title out of the plaintiffs, and set up a tenancy in common with them to defeat a recovery. The jury found a verdict for the defendant, and the plaintiffs now move for a new trial on a case.

*J. A. Spencer*, for the plaintiffs.

*J. Porter*, for the defendant.

*By the Court*, BRONSON, J. The children of Captain John Otaawighton, the patentee, so far as the fact of their being Indians is concerned, were capable of taking by descent, and, with the approbation of the surveyor general, of aliening the lands which had been granted to their father. (*Private Laws of 1809*, p. 62. 6 *Web.* 7, ch. 25, act of 2d March, 1810. 1 *R. S.* 720, § 13.) There can be no doubt that the certificate of approbation endorsed by the surveyor general on the deed to Gillett, was a compliance with the acts of 1809 and 1810. (See *Jackson v. Brown*, 15 *John. R.* 264; *Murray v. Wooden*, 17 *Wend.* 531.)

There must, I think, have been some mistake in drawing up that part of the charge of the judge, in which he is made to say, that the deed to Gillett was good as to any of the grantors who were at the time married women; and that it was void as to such of the grantors as were infants.

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for I hold the converse of both those propositions to be the law. The deed of an infant is voidable only—not void. (*Bool v. Mix*, 17 Wend. 119.) And as to the married women, they not only executed the deed without their husbands, but there was no such acknowledgment as the statute required for passing the estate of a *feme covert*. (1 K. & R. 478, § 2.) Without an acknowledgment on a private examination, &c. the deed was a mere nullity.

We are referred to the act of 1809, which declares, that the deed of certain Indian heirs shall be valid, if executed with the approbation of the surveyor general. (*Private Laws of 1809*, p. 62. 1 R. S. 720, § 13.) But the object of that act was to give *Indians*, in certain cases, the same capacity to take, hold, and convey lands, as though they were “citizens of this state.” It was not designed to remove any other disability; and as to the questions of infancy and coverture, the deed can have no other effect than though it had been executed by persons who were not Indians. As to the infant grantors, the deed is voidable only—not void; as to the married women, it is a nullity.

The plaintiffs, therefore, made out a title in Gillett to either four or five sixths of the property, according as it shall turn out that both or only one of the daughters of Captain John were married at the time the deed to Gillett was executed.

There can be no doubt, upon the evidence, that Gillett assigned this and his other property at the time he was discharged as an insolvent debtor in 1812. His counsel contend, however, that the insolvent law of 1811 was unconstitutional and void, and that the assignment was consequently inoperative. But the act of 1811 has never been held to be wholly void. On the contrary, it has been held valid as to a large, and probably much the largest class of creditors who were affected by it. For aught that appears, the discharge was valid as to all the creditors of Gillett; but if it was good as to any of them, it does not lie in his mouth to say the assignment was inoperative.

The assignment was evidently made to Jacacks, Mandoll

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and Norton, the persons designated by the recorder; and not to Goodwin, as a substitute for Jacacks. But there was evidence, from which the jury might, perhaps, have found, had the question been submitted to them, that an order, substituting Goodwin in the place of Jacacks, was made by the recorder soon after the discharge was granted. As this was after an assignment had been made to, and accepted by Jacacks, and the other persons originally named by the recorder, the circuit judge was of opinion that the officer had exceeded his powers, and that the order appointing Goodwin was void. In that decision I think he erred. The first section of the insolvent act of 1811 provides, that the officer, if satisfied, &c. shall direct a grant or assignment of the petitioner's estate to three persons, to be named by the officer. (6 *Web.* 200.) The second section provides, "that in case of the refusal to serve, death, absence, or incapacity, by reason of sickness, or otherwise, of any person so named as assignee, the said recorder or commissioner shall and may appoint another in his stead; and so, from time to time, as often as any vacancy shall happen from any of the causes before mentioned, such vacancy being sufficiently suggested and made to appear to such recorder or commissioner." The language of this section, especially the last clause of it, is very broad, and it seems difficult to deny that the legislature intended to provide for vacancies happening after, as well as before an assignment had been executed. In *Van Valkenburgh v. Elmendorf*, (13 *John. R.* 314,) no doubt seems to have been entertained, that the commissioner had power to supply a vacancy happening after an assignment had been executed.

If an order was in fact made, substituting Goodwin in the place of Jacacks, it may then become material to inquire, whether the deed from Mandell and Goodwin, as assignees of Gillett, to Justus Wright, was duly acknowledged and proved under the act of 1813. (1 *R. L.* 369, § 1.) The deed was acknowledged by Mandell, and as to him the certificate of the commissioner is sufficient. But as to Goodwin, the deed was not well proved. Although, from

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the record produced, the deed purported to be witnessed by Thaddeus Dann and another person, it does not appear that the Thaddeus Dann, who appeared before the commissioner, was a subscribing witness to the deed. That fact was neither stated by Lewis, who identified Dann, nor did Dann himself say that he was a subscribing witness to the deed. Again: although Dann testified before the commissioners, "that the said Goodwin duly executed the within deed," it does not appear how he arrived at the knowledge of that fact. The witness neither states that he saw the deed executed, nor that Goodwin acknowledged to him the execution of the deed. (*See Jackson v. Phillips*, 9 Cowen, 100, 112.) (a)

If Goodwin was not substituted in the place of Jacacks, or if he was so substituted, and it cannot be duly proved that he, as well as Mandell, executed the deed to Wright, then the title to the land still remains in the assignees of Gillett; for the deed of Mandell alone, who was one of several assignees, could not have the effect of conveying any interest in the land. The deed should have been executed by a majority of the assignees. (6 Web. 207, § 17.)

Gillett, as we have already seen, only acquired the title of four or five of the six heirs of the patentee; and one or two of the heirs are tenants in common with Gillett's assignees. But it is impossible to maintain, that the defendant, without showing any connection whatever with the title, is to be deemed in possession under those heirs as a tenant in common with the assignees, and so making it necessary for the plaintiffs to show an actual ouster. In the absence of all proof on the subject, there is just as much ground for saying that the defendant holds under the assignees, as there is for saying he holds under the heirs of Captain John, who yet own one or two sixths of the property. So far as appears, the defendant is a mere trespasser, having no connection whatever with the title. Be fore

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(a) See also *Norman v. Wells*, (17 Wend. 136, 142, 3;) *Munns v. Dupont*, 3 Wash. C. C. Rep. 32, 42;) *Kirgwood v. Bethlehem*, (1 Green's Rep. 228.)

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he can call on the plaintiffs to prove that they have been ousted, he must show that he is himself a tenant in common with them, or that he is in possession under some person holding that relation to the plaintiffs. Although the defendant was a trespasser, yet, as he did not enter or hold under the plaintiffs, he was undoubtedly at liberty to show a title out of them in a third person ;(a) but that is a very different thing from putting the plaintiffs to prove an actual ouster.

As the case stood at the circuit, the assignees were entitled to recover all but one or two sixths of the property, and a new trial must be granted. But there is a question upon the pleadings. There can be no recovery under the first count, because it lays a title in Gillett *and* his assignees. The title is either in one or the other, and not in both. Where a joint title in several persons is alleged, it is not enough to prove a title in some of them. (*Doe v. Butler*, 3 *Wend.* 149.) The second count must also fail, because it sets up a title in Gillett, after that title had passed to his assignees. The third count lays the title in "Isaac Norton, *one of the surviving assignees* of Gillett;" and the fourth count is in the same form, but on the title of Jacacks. If there were two surviving assignees at the time the suit was brought, the title was in them jointly; and it should have been so laid, instead of alleging a several title in each.

Aside from the question of substitution, Jacacks and Norton were the surviving assignees of Gillett, at the time the suit was brought, in January, 1837. Mandell died in 1828. The pleader was right in making Jacacks and Norton parties, as surviving assignees; but he made a mistake in joining them with Gillett in the first count, and in separating them from each other in the third and fourth counts. If, as the defendant alleges, Goodwin was duly substituted in the place of Jacacks, the assignees were then, Mandell Goodwin and Norton. Mandell died in 1828, and Good-

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(a) See *Swart and others v. Service*, (21 *Wend.* 36;) also, *Bloom v. Burdick* *infra*, 138.)

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win in 1829 or 1830—both, before the action was commenced—and Norton was, therefore, sole surviving assignee. In this view of the case, the third count was properly framed, except that it called Norton *one* of the surviving assignees, instead of the surviving assignee of Gillett. This trifling misdescription might well have been disregarded at the circuit, and would have been cured by a subsequent amendment. But there is a further difficulty. The declaration is for the *whole interest*, while the proof shows the plaintiffs only entitled to an *undivided share* in the premises. (2 R. S. 304, § 9. *Holmes v. Seely*, 17 Wend. 75.)

If this cause goes to another trial, the plaintiffs, in order to meet the proof in all its aspects, should retain the count alleging a title in Gillett; the first count should be amended, so as to allege a title in Jacacks and Norton, (Jacacks having been alive at the time the suit was commenced,) as surviving assignees; and the third count should be amended, so as to state a title in Norton as surviving assignee. The fourth count is useless, in every view of the case. Counts should then be added so as to meet the proof in relation to undivided shares, instead of the entirety of interest.

The plaintiffs are at liberty to amend; and there must be a new trial—the costs to abide the event.

Ordered accordingly.



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## BLOOM and others vs. BURDICK.

Although by 1 R. L. 447, § 10, a surrogate was required, on granting letters of administration, to take from the applicant a bond with *two or more sureties*; yet the omission to do this was mere *error*, to be corrected on appeal, and not a jurisdictional defect, exposing the proceeding to collateral impeachment.

In a proceeding under that statute for a surrogate's sale to pay debts, it is essential to jurisdiction that the petition for that purpose should have been accompanied by an account of the personal estate, made at the time, as well as of the debts: and a reference to the general inventory previously filed, will not answer as a substitute for the former.

But if the account was, in truth, presented, it will suffice, though named in the proceedings, *an inventory*.

And where the petition was presented at the coming in of the general inventory; *held*, that no other account of the personal estate was requisite.

*Semble*, that the usual presumption in favor of the performance of official duty, is to have little weight in making out an essential jurisdictional fact.

The above statute did not require the actual application of the personal estate to the payment of debts, as a condition precedent to the right to petition for sale; but only that such application should have been made prior to the order of sale.

Where, in the order of sale, as well as the deed under it, the land was described as 'being ninety-one acres of the south west corner of lot number eleven;' and it was shown that the deceased died seized of just that quantity in the designated lot, and that his land touched the south west corner: *Held*, that the description was sufficient to pass the title to the purchaser.

A defendant in ejectment, not having entered under the plaintiff, may show title out of the latter without connecting himself with it.

Though the surrogate, by the presentation of the petition and account, acquired jurisdiction of the *subject matter*, he did not over *the persons* to be affected: and the latter is as essential to the validity of the sale, as the former.

A sale of real estate to pay debts, in virtue of a surrogate's order under the statute referred to, is valid as to infant heirs for whom no guardian was appointed.

The case of *Jackson, ex dem. McFail and others, v. Crawfords*, (12 Wendell, 533,) commented on and explained.

No one can be condemned, or divested of his rights, until he has had an opportunity, in some form, of being heard; as by serving process, publishing notice, appointing a guardian, &c. And if judgment be rendered against him before that is done, the proceeding will be utterly void.

Where a statute prescribes the mode of acquiring jurisdiction over the person, that mode must be complied with, or the proceeding will be a nullity.

The surrogate's court is one of inferior jurisdiction, and a party seeking to

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made title to real estate under its proceedings, must show affirmatively that it had jurisdiction.

The consequences of an ascertained jurisdictional defect, in avoiding the proceedings, is the same, whether the court be of superior or inferior jurisdiction. The distinction lies in the mode of reaching the defect. In regard to superior courts, their jurisdiction is presumed till the contrary appears; whereas the jurisdiction of inferior courts is never presumed, but must be proved.

The case of *Denning v. Corwin*, (11 *Wendell*, 647,) so far as it asserts that the judgment of a *superior* court will be void, if *the record do not show jurisdiction* expressly, has been overruled.

A statute authority by which one may be deprived of his estate, must be strictly pursued.

Where the proceedings are at common law, and an infant appears by attorney instead of guardian, or, after service of process, suffers a default, the judgment will be *erroneous* merely—not void.

EJECTMENT, for 91 acres of land, part of military lot No. 11, Dryden, tried at the Tompkins circuit, in September, 1839, before MONELL, C. Judge. The plaintiffs made title to *four ninths* of the premises in question, as the children and heirs at law of *Henry Bloom*, deceased. The defendant relied on showing title out of the plaintiffs by virtue of a surrogate's sale. Henry Bloom died seized of the premises in question on the 11th September, 1818, leaving nine children, most of whom, including all of the four plaintiffs, were under the age of twenty-one years. The defendant gave in evidence the following papers: 1. Letters of administration on the estate of Henry Bloom, granted by the surrogate of Tompkins county, on the 18th September, 1818, to three individuals. 2. A bond executed by the administrators on that occasion, which was in proper form, but there was but *one* surety. 3. A petition of the administrators to the surrogate, for an order to sell real estate; in which they represent, among other things, "that they have made a just and true *inventory* of all the goods, chattels and credits, of the estate of the said Henry Bloom, and also an *estimate* of the debts of the estate, all which, duly authenticated, is on file in the office of the said surrogate;" that the personal estate is insufficient to pay debts, &c. The petition was without date, and there was no mark upon it to show when it was filed. The surrogate before whom

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this business was transacted died before the trial, and the papers were produced by his successor in office. 4. An *inventory* of the goods and chattels of the deceased, dated 21st February, 1819, amounting to \$649,81; and also of the debts due the estate, amounting to \$373,56—total, \$1023,37. On the back of the inventory there was a certificate by Peter Conrad and James Nichols, that the within was a true appraisal of the personal property of the deceased, made by them. This was without date; but there was appended to the inventory the usual oath by each of the appraisers, that he would truly appraise, &c. which was taken before the surrogate on the 11th September, 1819. On the back of the inventory there was also an affidavit, the body of which was in the handwriting of the surrogate, and the signatures in the handwriting of the administrators, by which the administrators swore to the truth of the inventory; but there was no date or jurat to this paper. 5. An *account and estimate* of the debts due from the estate, amounting to \$2235,37—leaving a balance of debts, over and above the personal estate, of \$1212. To this account there was subjoined an affidavit by one of the administrators, that it was a just and true estimate of the debts, &c.; which purported to have been sworn on the 11th May, 1820—the body of the affidavit and the jurat being in the handwriting of the surrogate, but he had not subscribed his name. The name of the administrator was subscribed in his own handwriting. There was a note at the bottom of the inventory in the handwriting of the surrogate, by which it appeared that he struck the balance between the amount of debts to be paid, and the amount of the personal estate, making it as above mentioned, \$1212. 6. An order by the surrogate, on the 12th May, 1820, reciting, among other things, that the administrators had presented a petition to the surrogate setting forth that they had made a just and true *inventory and estimate* of the personal estate, whereby it appeared that the personal estate was insufficient to pay the debts; and further reciting, that

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the inventory and estimate mentioned in the petition had been duly filed in the surrogate's office. It was thereupon ordered, that all persons show cause on the 26th June, then next, why so much of the real estate should not be sold, as would be sufficient to pay his debts. This order was duly published. The only evidence of this order, was the printed copy of it annexed to the affidavits of the publication; and a recital of it in the subsequent order of the surrogate, ordering a sale. 7. An order of the surrogate, on the 26th June, 1840, for the sale of "all that certain piece or parcel of land, situate, lying and being in the town of Dryden, in the county of Tompkins, and state of New-York, *being ninety-one acres of the south west corner* of lot number eleven, in the said town of Dryden." The intestate, besides this land, died seized of a farm in Lansing, Tompkins county, on which he lived before his death.

The sale was duly advertised, and made in pursuance of the surrogate's order; the property was purchased by *Abraham Bloom*, for the sum of \$1200; the sale was confirmed by the surrogate, and a deed was executed to the purchaser on the 19th December, 1820, describing the land as it is described in the surrogate's order. That part of lot No. 11, of which the intestate died seized, and which is in controversy in this suit, lies in the form of an L, one leg being 13 chains wide on the south line of the lot, and 50 chains 82 links long on the west line of the lot; and the other leg, being 10 chains 82 links wide, north and south, and extending eastward, from the north end of the first leg, 23 chains and 5 links.

The present surrogate testified, that he could find no order by the surrogate to show cause why the real estate should not be sold, except the printed copy annexed to the affidavits of publication; that he could find no account of the property, other than the inventory produced, nor any appointment of guardians for the infants, nor any bond in relation to such appointment.

The plaintiffs gave evidence for the purpose of showing

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fraud in procuring the sale, when not necessary for the payment of debts.

The judge, without specifying on what particular ground he thought the sale void, directed the jury to find a verdict for the plaintiff; which the defendant now moves to set aside.

*C. Humphrey*, for defendant.

*B. Johnson*, for plaintiffs.

*By the Court*, BRONSON, J. As the judge did not specify on what particular ground he held the sale under the surrogate's order void, it will be proper to examine the several objections which have been urged against the validity of the sale, on the argument. The counsel for the plaintiffs insists that the sale was void, on several grounds.

I. It is said that administration was not duly granted, because there was but one surety to the bond. The 10th section of the act of 1813 provides, that the surrogate shall, upon granting administration of the goods of any person dying intestate, take of the person or persons to whom such administration shall be granted, sufficient bonds to the people of this state, with *two or more* competent sureties. (1 R. S. 447, § 10.) The duty of the surrogate is plain, but the omission to take two or more sureties, is not a matter which goes to the foundation of the proceeding, so as to render the letters of administration void. Only two things were essential to the jurisdiction of the surrogate in granting administration, to wit, the death of the intestate, and the fact that at, or immediately previous to his death, he was an inhabitant of the same county with the surrogate. (§ 3.) If those facts existed in this case, which is not denied, the surrogate had authority to act, and the omission to take a proper bond, was an error to be corrected on appeal, (§ 32,) and not a defect of jurisdiction which would render the whole proceeding void.

II. It is said, that the application for a sale of the real estate was not accompanied by an *account* of the personal

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estate and debts of the intestate: that instead of an account made *at that* time of the personal estate, reference was had to the usual inventory which had been previously filed. This is an important point, because a petition and account are essential to the surrogate's jurisdiction in ordering a sale. The administrator is in all cases to make and exhibit an inventory of the personal estate, within six months after the grant of administration. (§ 10.) And without any reference to that provision, he must accompany his petition for a sale of land by an account of the personal estate and debts, as far as he can discover the same. (§ 23, 26.) If the general inventory had been previously filed, and there was no account beyond a reference to that document, it would not, I think, be sufficient, and the order to sell could not be supported. I have already remarked, that the requirement of an account is wholly independent of that relating to the inventory; the one must be furnished, although the other may be on file. There is good reason for such a rule. The administrator, before the application for a sale, may have discovered personal estate of the intestate, of which he had no knowledge at the time the inventory was filed; debts due the intestate, which were deemed bad at the time of making the inventory, may have proved available, either in whole or in part; and property, which was appraised, may have advanced in value. It is therefore proper, as well as a plain requirement of the statute, that there should, in all cases, be an account at the time of the application for a sale of real estate.

But if an account is in fact presented, it can do no harm that it receives the name of *inventory*, instead of *account*. Nor do I think it necessary that there should be two separate documents, in a case where the common inventory is presented at the time of applying for a sale. When the inventory comes in at that time, it must necessarily contain the same matter that would appear by such an account as is mentioned in the 23d section; and one document may well answer the double purpose of inventory and account.

It becomes therefore important to inquire, when the in-

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Inventory in this case was filed. It is dated in February, 1819; but it seems quite probable that it was not filed at that time, because there is an oath of the appraisers appended to it, which was sworn before the surrogate on the 11th of September following. It may not have been filed on the last mentioned day; for the oath then made was not to the truth of the inventory, as though that document had already been prepared, but the oath of each appraiser was, that "*I will truly, honestly and impartially appraise,*" &c. An account or estimate of the debts to be paid, was evidently presented to the surrogate at the time of applying for a sale. An affidavit of one of the administrators, purporting to have been sworn on the 11th May, 1820, the day before the order to show cause, was subjoined to this account, and the jurat was in the hand-writing of the surrogate, though his name was not subscribed to it. The petition for a sale speaks of the inventory of the personal estate and this account of debts in terms which, to say the least, cannot be made to imply that they were presented or filed at different times. There is, on the one side, little or no evidence to prove that the inventory was filed before making the order to show cause, and on the other, there is some evidence tending to show that it was filed at that time. And here the presumption that every officer does his duty, may, perhaps, be entitled to some weight; (*Ford v. Walworth*, 19 *Wend.* 334;) and would aid the conclusion, that the inventory was presented at the proper time for sustaining the jurisdiction of the surrogate. I do not think, however, that much importance should be given to that presumption, where, as in this case, it is resorted to for the purpose of making out a vital jurisdictional fact. But without it, there was some evidence for the jury. What they would have said, as to the time of filing the inventory, if the question had been submitted to them, I will not attempt to conjecture. I have only noticed the evidence far enough to show that there was a question for the jury; and it follows, that if the judge based his decision against the validity of the sale, on the ground that there was no account, there must be a new trial.

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III. The next objection is, that before petitioning for a sale, the administrators had not applied the personal estate which had come to their hands towards the payment of the debts of the intestate. An inventory must be filed before asking for a sale, but it is enough if the personal estate has been applied to the payment of debts before a sale is ordered. The application may be made between the order to show cause, and the final order for a sale. (§ 26.) In this case, the amount of debts to be paid was \$2235,37; the personal estate amounted to \$1023,37: the balance, \$1212, was struck by the surrogate, and probably at the time the petition was presented. In the order for a sale, the surrogate adjudges, that the personal estate was insufficient for the payment of debts, and that there *yet remained due and unpaid*, of the debts, besides costs, the sum of \$1212, which is the precise amount of debt that would remain unpaid if all the personal estate had been previously applied to that object. There is, therefore, some reason for believing that the personal estate had been properly applied before the order for a sale was made.

IV. It is also objected, that nothing passed by the sale, in consequence of the defective and imperfect description of the land in the surrogate's order, and in the administrator's deed. (§ 23.) If there was nothing in the case beyond the words, "being ninety-one acres of the southwest corner of lot number eleven," there would be some difficulty in saying that all of the land passed which is in controversy in this suit. The description would be best answered by laying out ninety-one acres in a *square form* on the southwest corner of the lot, which would not include more than forty acres of the land of the intestate, and would include about fifty acres of land belonging to some other person. But there is, I think, enough in the case to help the purchaser out of this difficulty. It was an order for the sale of the real estate of which Henry Bloom died seized, and there were to be ninety-one acres in a specified lot. The intestate owned precisely that quantity of land, and no more, in the designated lot, and his land



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touched the southwest corner of the lot, though it did not lie in a square form. The surrogate evidently had in view the particular parcel of land which the intestate owned in lot number eleven. The matter must have been well understood by all of the parties in interest, and I think the whole of the land in controversy might well pass by the deed.

V. If there was ground for imputing fraud to Abraham Bloom, the purchaser, that was a question of fact for the jury.

VI. As the defendant did not enter under the plaintiffs, he was at liberty to show a title out of them, although he did not connect himself with that title.

VII. The only remaining question is, whether the plaintiffs, who were infants at the time of the proceedings before the surrogate, and for whom no guardian was appointed, are concluded by the sale. We have been referred to the cases of *Jackson v. Robinson*, (4 *Wendell*, 436,) and *Jackson v. Crawfords*, (12 *id.* 533,) as deciding the point against the infant heirs. But I have been unable to discover that this question was involved, or even mentioned, in *Jackson v. Robinson*; and the decision in *Jackson v. Crawfords*, turned upon another ground. The objection was taken, in that case, that no guardian *ad litem* had been appointed for the infants; but such evidence was given in relation to what was done before the surrogate, and the probable loss of a portion of the papers, that the judge told the jury they would be warranted in presuming that *all necessary proceedings had been duly had before the surrogate, and that guardians for the infant heirs had been duly appointed*. On a motion for a new trial, *Sutherland, J.*, who delivered the opinion of the court, said, "the parol evidence fully warrants the conclusion, that *all the proceedings before the surrogate were strictly formal and regular*." And again, "the presumption of *the entire regularity* of those proceedings is strengthened by the long acquiescence of the heirs at law." In the case at bar, although there is evidence enough that this business was

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loosely done, there is no evidence tending to show the loss of papers, and no foundation has been laid for presuming the appointment of a guardian. It is in proof, that none was appointed, so far as appears from the records and papers in the surrogate's office. This is then a case where the question is directly and necessarily presented, and that too for the first time, so far as I have observed, whether infant heirs can be concluded under this statute without a guardian to appear for, and take care of their interests.

The surrogate undoubtedly acquired jurisdiction of the *subject matter*, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction over the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court: and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance. (*Borden v. Fitch*, 15 *John. R.* 121. *Bigelow v. Stearns*, 19 *id.* 39. *Mills v. Martin*, 19 *id.* 7.) This is the rule in relation to all courts, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears; whereas an inferior court, and those claiming under its authority, must show that it had jurisdiction. (*Foot v. Stevens*, 17 *Wendell*, 433. *Hart v. Seixas*, 21 *id.* 40.) The surrogate's court is one of inferior jurisdiction; it is a mere creature of the statute. (*Dakin v. Hudson*, 6 *Cowen*, 221.) Indeed, it has been held in all the cases relating to surrogates' sales, that the person claiming under them must show affirmatively that the officer had acquired jurisdiction. The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it *appears* that there was a want of jurisdiction, the judgment will be void, in whatever court it was rendered.

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It is not only a general principle in the law, that courts must acquire jurisdiction over the persons to be affected by their judgments, but in relation to these sales the statute has specially pointed out the means, and imposed the duty, of bringing the proper parties before the court. The surrogate, when the subject has been properly presented to him, must in the first place make an order directing all persons interested in the estate to appear before him at a certain day and place, to show cause why the real estate should not be sold for the payment of debts; and this order must be published in two newspapers for four weeks successively. (§ 23.) This notice serves the purpose of bringing in all such persons as the law presumes capable of taking the charge of their own interests, and defending themselves in courts of justice; but it does not include infant heirs and devisees. The 31st section was made for their protection; and it provides, "that in all cases where a petition shall be presented by any executors or administrators, for the sale of the whole or part of the real estate of their testator or intestate, and one or more of the devisees or heirs of such testator or intestate shall be *infants*, the judge of the court of probates or the surrogate to whom the same may be presented, shall appoint some discreet and substantial freeholder *a guardian* of such infant or infants, *for the sole purpose of appearing for, and taking care of the interest of such infants*, in the proceedings therein." This mode of bringing the infant heirs was not pursued, and the plaintiffs have had no day in court. Without it, they cannot be deprived of their inheritance.

The cases to which I have already referred have settled the principle decisive of this question. But I will mention a few other decisions, for the purpose of showing that the prescribed form for obtaining jurisdiction of the person, whatever that form may be, must be strictly pursued. In the *Matter of Underwood*, (3 Cowen, 59,) the creditors of an insolvent debtor were to be brought in by the publication of a notice for ten weeks, and it was held, that the judge had no jurisdiction to grant a discharge where the

notice had been published only *six* weeks. In *Denning v. Corwin*, (11 *Wendell*, 647,) a judgment of this court, in partition, was held void, because it did not appear by the record that the notice required by the statute in the case of unknown owners had been duly published. This case, so far as it asserts the doctrine that the judgment of a *superior* court will be void *if the record do not show jurisdiction*, has been overruled. (*Foot v. Stevens*, 17 *Wendell*, 483. *Hart v. Seixas*, 21 *id.* 40.) But the principle remains untouched, that whenever the want of jurisdiction *appears*, the judgments of any and all courts will be void; and when the party in interest is to be brought in by means of a public notice, the want of such notice will be a fatal defect.

In *Messinger v. Kintner*, (4 *Binn.* 97,) a decree of the orphan's court was held void as against infants, for whom no guardian had been appointed pursuant to the statute. In *Smith v. Rice*, (11 *Mass. R.* 507,) the statute required that the judge of the court of probates should appoint guardians for infants, and some discreet person to represent a party out of the state; and for want of such appointment, the proceedings were held to be void. This decision was fully approved in *Proctor v. Newhall*, (17 *Mass. R.* 91.)

The rule that there must be jurisdiction of the person, as well as the subject matter, has been steadily upheld by the courts; and it cannot be relaxed without opening a door to the greatest injustice and oppression.

In every form in which the question has arisen, it has been held, that a statute authority by which a man may be deprived of his estate must be strictly pursued. In *Thatcher v. Powell*, (6 *Wheat.* 119,) Marshall, C. J. said, it was a self evident proposition, that no individual or public officer can sell and convey a good title to the land of another, unless authorized so to do by express law; and the person invested with such a power, must pursue with precision the course prescribed by law, or his act will be invalid. In accordance with this doctrine, the case of *Jackson v. Esty*, (7 *Wendell*, 148,) was decided. Savage, C. J. there says, "it is a cardinal principle that a man shall not be divested

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of his property but by his own acts, or the operation of law; and where proceedings are instituted to change the title to real estate by operation of law, the requirements of the law under which the proceedings are had must be strictly pursued." In *Rea v. McEchron*, (13 *Wendell*, 465,) a sale under this statute was held void for want of an order of confirmation by the surrogate; and in *Atkins v. Kinnan*, (20 *Wendell*, 241,) the deed to the purchaser was held void, because it did not set forth at large, as the statute requires, the order of sale made by the surrogate. (See also *Jackson v. Shepard*, 7 *Cowen*, 88; *Williams v. Peyton*. 4 *Wheat*. 77.)

The rule which requires a strict compliance with a statute authority under which a man may be deprived of his estate, is one of a most salutary tendency; and this is a much stronger case for its application than some of those which have been mentioned. I do not intend to say that there was any fraud in procuring this sale. That was a question for the jury. But I cannot forbear to remark that there were circumstances well calculated to awaken suspicion that all was not right; and if there had been a compliance with the statute, by appointing a guardian to appear and take care of the interest of the infant heirs, I think it far from being clear that their land would have been sold. But however that may be, they could only be deprived of their inheritance by pursuing the forms prescribed by law.

It is said that the plaintiffs had a remedy by appeal; and it is true that the statute gives a party claiming to be aggrieved fifteen days to appeal from a decree or order of the surrogate. (§ 32.) But this argument was well answered by Jackson, J. in *Smith v. Rice*, (11 *Mass. R.* 512.) He says, "the very grievance complained of is, that the party had no notice of the pendency of the cause, and of course no opportunity to appeal." He then proceeds to show, that when the judge of probate undertakes to determine the rights of parties over whom, for the want of notice, he has not acquired jurisdiction, and the parties have had no op

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portunity to appeal, they may consider the act or decree as utterly void.

When the proceedings are at common law, and an infant appears by attorney instead of guardian, or, after being served with process, suffers a default, the judgment will be erroneous—not void. But here there has been neither service of process nor appearance in any form. The judgment would have been void had the proceedings been at the common law; and it is clearly so in this case, where the defendant is attempting to build up a title under a statute, without complying with its requirements.(a)

New trial denied.

(a) The same point arose in *Hubbard v. Wilder*, decided at this term, and was disposed of in the same way.

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 STEPHENS vs. SINCLAIR.

Where one took a deed of another's farm, to defraud the grantor's creditors, and afterwards, in pursuance of the same fraudulent arrangement, procured an assignment of an outstanding valid mortgage on the same farm, with the grantor's money; *held*, in ejectment by one deriving title under a judgment and execution against the grantor, that neither the deed nor assignment were available as a defence.

By an assignment procured under such circumstances, the *grantor* is constituted the *real assignee*, and the whole enures to the benefit of his creditors, who may seize and sell the land discharged of the mortgage.

EJECTMENT, for a farm in Coeymans, tried at the Albany circuit in June, 1839, before CUSHMAN, C. Judge.

At the trial, the plaintiff deduced a title to himself by sheriff's sale, under a judgment of the 11th of May, 1835, in favor of the plaintiff and another, against James Armstrong and Lawrence Armstrong. The judgment was obtained in assumpsit and amounted to \$302,91. The defendant admitted that James Armstrong purchased the farm by deed, bearing date June 15th, 1827.

On the part of the defendant, it was shown, that James Armstrong, on the day he acquired his deed, mortgaged

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the farm, in fee, to Epenetus Reid, to secure the payment of \$1000 on the 15th of March, 1831 ; that this mortgage was assigned by Reid to Sinclair, the defendant, on the 8th of May, 1835, for the consideration of \$433,50. Sinclair defended in virtue of this assignment.

In reply, the plaintiff offered to prove, that on the 8th of October, 1834, James Armstrong and the defendant agreed, that the defendant should take a conveyance of the premises in question to cover them against the plaintiff's expected judgment—his suit being then pending ; that, on the same day, Armstrong conveyed the farm to the defendant, who declared that he took subject to the said mortgage ; that the defendant obtained the said assignment in pursuance of said fraudulent agreement ; that Armstrong furnished him with the money to pay the consideration for said assignment, which he paid to Reid ; that both the deed and assignment were taken to defraud the plaintiff in respect to his debt and judgment.

The offered testimony being objected to, and rejected by the judge, the plaintiff's counsel excepted. The judge nonsuited the plaintiff ; and he now moves to set aside the nonsuit, and for a new trial, on a bill of exceptions.

*R. W. Peckham*, for plaintiff.

*M. T. Reynolds*, for defendant.

*By the Court*, COWEN, J. Most clearly, the learned judge erred in rejecting the plaintiff's testimony. It is said, the defendant held a valid mortgage ; and though he took a fraudulent deed, that would not vitiate the mortgage. The argument assumes what does not exist in respect to this plaintiff. If the proposed facts were true, the defendant does not hold the mortgage ; he never had an assignment of it. The writing purporting to be an assignment is mere waste paper, void both by the common law, and the statute of the 13th Elizabeth, re-enacted here. Armstrong was the real assignee. The assignment was in consid-

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eration of his money, and the defendant stood a mere fraudulent go-between, a character which the law strikes down to a blank. In short, the whole being intended to defraud a creditor, is void. It displaced no right of Armstrong, and the entire transaction enures to the creditor's benefit. If the offered evidence be true, he is entitled, on principles of law and honesty, to recover and hold the land discharged of the mortgage.

New trial granted

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THOMAS vs. ALLEN.

In debt on bond, conditioned *to pay a sum of money* for the plaintiff on a bond and mortgage executed between third persons, and to *save the plaintiff harmless, &c.*; *held*, that a breach, alleging merely that the sum became due, &c. and was *not paid at the day*, was well assigned, though it did not show that the plaintiff had been actually damaged.

The case of *Douglass v. Clark*, (14 John. R. 177,) *contra*, is overruled.

Such a bond is more than a bond of *indemnity*—it imposes a positive obligation to pay at the day.

DEMURRER to declaration. The action was debt on bond, dated 23d May, 1836, penalty \$1600—with condition *to pay the plaintiff \$800, by satisfying* a bond and mortgage (on certain premises that day conveyed by the plaintiff to the defendant) executed by O. G. Steele to G. W. Jonson and dated 18th November, 1835, according to the conditions thereof; *and to save harmless* the plaintiff therefrom, and also from all costs and charges that might be occasioned by the delay or non-payment of the same. *Breach*, that the sum of \$800 became and was due and payable on a specified day, on the bond and mortgage of Steele to Jonson, and that the defendant had not paid or satisfied the same. *Demurrer*, on the ground that this was a bond of *indemnity*, and that the breach did not show that the plaintiff had been *damnified*. Joinder.



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*A. Taber*, for defendant.

*J. Holmes*, for plaintiff.

*By the Court*, BRONSON, J. The fair inference to be drawn from the defendant's bond, seems to be, that the plaintiff was in some way bound to pay the debt which Steele owed to Jonson. If it was not so—if the plaintiff had no interest in having the debt paid when it should become due—why did he take the defendant's bond to secure the payment? Again, the defendant agrees that he will *pay the plaintiff* a sum of money *by satisfying* the bond and mortgage to Jonson. If the satisfaction of those securities would be a payment to the plaintiff—and the parties agreed that it would be so—then the plaintiff must either have been bound for, or had a direct interest in the extinguishment of Steele's debt.

The case then comes to this: the defendant agrees that he will pay a sum of money when it becomes due, for which the plaintiff is bound to some third person, and that he will save the plaintiff harmless, &c. This is more than a bond of indemnity, and the breach is well assigned by showing that the debt to Jonson was not paid at the day. Sergeant Williams says, that *non-damnificatus* cannot be pleaded where the condition is to *discharge* or *acquit* the plaintiff from such a *bond, or other particular thing*, for there the defendant must set forth affirmatively the special matter of performance. But it is otherwise, where the condition is to discharge and acquit the plaintiff from any *damage* by reason of such bond or other particular thing, for that is in truth the same thing with a condition to indemnify and save harmless. (1 *Saund.* 116, note 1.) In *Holmes v. Rhoades*, (1 *Bos. & Pul.* 638,) the condition of the defendant's bond was to pay a sum of money when it should become due, for which the plaintiff was bound to a third person, and to indemnify; and a plea of *non-damnificatus*, was held to be no answer to the action. *Hodge v. Bell*, (7 *T. R.* 93,) is to the same effect. These cases have

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been fully approved, and the principle which they assert has been sanctioned by the highest authority in this state. (*Port v. Jackson*, 17 *John. R.* 239, and *id.* 479, *S. C.* affirmed on error.) This decision must be regarded as having, in effect, though silently, overruled the case of *Douglass v. Clark*, (14 *John. R.* 177,) on which the defendant relies. (See also *Matter of Negus*, 7 *Wendell*, 499.)

Judgment for plaintiff.

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HUNT vs. AMIDON.

The defendant sold certain real estate to W., who gave back a bond and mortgage, which the defendant assigned to T.; afterward, W. re-conveyed the premises to the defendant, who then deeded them to B., covenanting for quiet enjoyment, and B. conveyed to the plaintiff; whereupon T. proceeded to foreclose the mortgage, and, on the sale under it, the plaintiff became the purchaser: *Held*, that assumpsit as for money paid, &c. would not lie by the plaintiff to recover against the defendant the purchase money paid on the mortgage sale, even though the defendant had, on his selling to B., verbally promised him to pay off the mortgage; and consequently, evidence of the promise is, in such case, irrelevant and inadmissible.

*Semble*, such promise could not have been available to B., had he retained the title, and become the purchaser under the mortgage; for, if made prior to, or contemporaneous with the sale to him, it was merged in the deed; and if after, there having been no eviction, it was without consideration.

A promise by the grantor to his grantee, to pay off an existing incumbrance, will not enure to one to whom the grantee subsequently conveys.

ASSUMPSIT, on the money counts, tried at the Rensselaer circuit, before CUSHMAN, C. Judge, in March, 1839. The plaintiff claimed to recover for money paid to the defendant's use; and the case was this: In December, 1824, the defendant conveyed a farm, containing 43 acres of land, to Philip I. Wheeler; and Wheeler, at the same time, gave back a mortgage, with a bond, to the defendant, to secure the payment of \$550, with interest. In February, 1825, the defendant assigned the bond and mortgage to

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John Taylor. In January, 1828, Wheeler re-conveyed the farm to the defendant by quit-claim deed. In December, 1830, the defendant conveyed the farm, together with another piece of land, to Jonas B. Babcock, for the consideration of \$1200; and the deed contained the usual *covenant for quiet enjoyment*. In October, 1834, Babcock conveyed the two pieces of land to the plaintiff, by quit-claim deed. Taylor, the assignee of the mortgage, foreclosed in chancery, making Wheeler, the mortgagor, and the plaintiff, who was then the owner, parties; and there was a decree over against Wheeler for any balance which might not be raised by the sale of the premises. The farm was sold under the decree, in October, 1836, and purchased by the plaintiff for \$470. This sum, with the interest on it, the plaintiff claimed to recover of the defendant as so much money paid to his use. The plaintiff gave evidence tending to show, that *the defendant promised Babcock, when he conveyed to him, to pay off the mortgage*. This evidence was objected to by the defendant, and exception was taken to the ruling of the judge in admitting it. Several objections were taken by the defendant to the plaintiff's right to recover. The judge charged the jury, that if they believed the plaintiff's farm had been sold under the decree in chancery to pay a debt which was the defendant's to pay, then this equitable action for money paid to his use might be maintained for the amount which the plaintiff was compelled to pay to save his land. The defendant excepted. Verdict for plaintiff, \$550,68. The defendant now moves for a new trial on a bill of exceptions.

*M. T. Reynolds*, for defendant.

*D. L. Seymour & S. Stevens*, for plaintiff.

*By the Court*, BRONSON, J. It will not be necessary to examine all of the questions which were made on the trial. The statement of a few plain principles will be sufficient

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to dispose of the case. As there has been no eviction, there has been no breach of the covenant for quiet enjoyment in the defendant's deed to Babcock. The action then rests on the promise which, it is said, the defendant made to Babcock, to pay off the mortgage. The promise was made at the time the deed was executed, and was merged in the written agreement. If it had been made *after* the conveyance, it would have been without consideration, and void. The remedy would be on the covenant in the deed. (*Miller v. Watson*, 5 Cowen, 195.) Although that case was several times before the court, the principle laid down at first was not afterwards departed from. The evidence to show a promise, was improperly admitted.

It follows, from what has been said, that Babcock, if he had paid the money, could not maintain an action on the ground of a promise. But suppose he could. Aside from the covenant, which runs with the land, there is no privity between the plaintiff and the defendant. Surely, the *promise* did not run with the land, and so pass by Babcock's deed to the plaintiff; and there has been no assignment of it in any other form. But if it had been transferred, the assignee could not sue in his own name.

The defendant is bound by *express* contract—the covenant for quiet enjoyment; and the plaintiff cannot recover on the ground of an *implied* promise.

New trial granted.

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Hollister v. Bender.

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## HOLLISTER and another vs. BENDER.

Where the action was for the breach of a contract to furnish timber; the defence, a failure of the plaintiff to make a certain money advance, which the contract bound him to make before the work commenced, *if called for*; and the case finally turned upon the sole question whether the advance had or had not been *called for*, as to which the evidence was quite conflicting: *held*, that on this point, the *onus probandi* was upon the defendant; and the judge having charged that *the jury ought not to find against the defendant if they had reasonable doubts* in respect to it, a new trial was ordered.

Upon *non-assumpsit* pleaded, though the *onus* is on the plaintiff to show a promise; yet, *semble*, in respect to matter of defence which, though proper under that issue, does not come in by way of rebutting the plaintiff's evidence merely, (e g. payment, release, accord and satisfaction, &c.) the defendant has the *onus*.

It can make no difference, whether the defence springs out of the contract sued on, or arises *aliunde*.

The substance of the allegation *to be tried*, rather than the particular shape of the pleadings, must determine where the *onus* lies; especially, in cases where the defendant is not required to plead the matter intended to be relied on.

The defence in this case was, *it seems*, a proper subject for a special plea.

A special plea setting up matter beyond a simple denial of what the plaintiff, under the general issue, would be bound in the first instance to prove, is not bad as amounting to the general issue, even though the matter would be evidence without being pleaded.

ASSUMPSIT on a special contract, tried before WILLARD, C. Judge, at the Oneida circuit, in May, 1838. The plaintiffs gave in evidence a written agreement, dated December 19, 1833, by which the defendant agreed to furnish and deliver to the plaintiffs, on the bank of the Erie canal, 3000 sticks of cedar timber of a particular description—2000 sticks to be delivered by the first of June then next, and the residue by the first of boating in the year 1835. The plaintiffs were to pay for the timber on delivery, at fifteen cents per stick. The plaintiffs also agreed, that if the defendant should want money before the contract was fulfilled, they would advance \$100, *if called for* after the middle of January then next—the defendant giving good security; and each party was to give security for fulfilment of the

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contract, if required by the other. The execution of the contract was admitted, and there was no pretence that the defendant had ever delivered any part of the lumber. His defence rested on the allegation, that in March or April, 1834, he called on the plaintiffs and required the advance of \$100 provided for by the contract, and offered to give security for performance on his part, and that the plaintiff had failed to make the advance. Upon the question whether the defendant had required an advance of the \$100 and offered security, which was the only question going to the foundation of the action, the evidence was strongly conflicting. The judge charged the jury, that *in judging of the balance of the testimony in a doubtful case, it was the duty of the party holding the affirmative to make out his case, and that the jury should not find a verdict against a defendant, the effect of which would be to take money from him and give it to the plaintiffs, unless the testimony preponderated against him; that if the whole testimony, in the opinion of the jury, left the case in doubt—if it was so nearly balanced that they entertained reasonable doubt—they should find for the defendant.* The plaintiffs excepted, and the jury found a verdict for the defendant. The plaintiffs now move for a new trial on a bill of exceptions.

*T. Jenkins*, for plaintiffs.

*J. A. Spencer*, for defendant.

*By the Court*, BRONSON, J. The charge of the judge was, I think, calculated to mislead the jury. They were told, in effect, that the plaintiffs held the affirmative of the question which the jury were to decide; that they should not find a verdict against the defendant unless the testimony preponderated against him; and that if the jury entertained a reasonable doubt, they should find for the defendant. The rule that there must be no reasonable doubt, belongs more appropriately to criminal, than to civil cases. But aside from that consideration, I think the burden of proof

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in relation to the only controverted fact going to the ground of the action, was upon the defendant. He held the affirmative, and it was for him to make out a preponderance of evidence. The execution of the contract was admitted, and when it was read in evidence, the plaintiffs had completely made out their case. There was no pretence of performance on the part of the defendant; and there was no condition precedent to be performed on the part of the plaintiffs. By the contract, they had nothing to do until the timber should be delivered—unless they were sooner put in motion by a request to advance the \$100 and an offer of security. The defendant gave no evidence in answer to that on which the plaintiffs rested their case; but he set up another and a distinct matter in bar of the action. He rested his defence upon the allegation that he had required an advance of money and offered security; and it was necessary for him to establish that allegation before he could make out any duty or default on the part of the plaintiffs. Aside from the question of damages, which received a separate consideration from the judge, the only matter in controversy between the parties on the trial, was, whether the advance of money had been required and security offered by the defendant; and in relation to that matter the defendant plainly held the affirmative, and the *onus probandi* was upon him.

It is true, that upon *non assumpsit* pleaded, the plaintiff holds the affirmative of the issue, and the *onus* of making out a *promise* is upon him; but he does not hold the affirmative of every question that may be made under that issue. The defendant, without at all controverting the promise, may set up payment, release, accord and satisfaction, and other matters of defence under the plea of *non assumpsit*; and when he does so, the burden of proof is upon him, and he must establish his allegation by a preponderance of evidence. And such must, I think, be the rule in relation to every matter set up as a defence to the action, which does not come in by way of answer to the evidence for the plaintiff. It can make no difference in principle

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whether the defence springs out of the contract on which the action is brought, or arises *aliunde*.

The defence on which the defendant relied might have been pleaded specially in bar of the action. He might have alleged in pleading, what he said on the trial, to wit: true it is that I made the promise, and that I did not deliver the timber; but *actio non*, because I called for an advance of \$100 and offered security in pursuance of the contract, and the advance was not made. Such a plea would not be objectionable, even upon special demurrer, as amounting to the general issue; for it does not deny any fact which the plaintiffs would be bound to prove in the first instance, upon the plea of *non assumpsit*. If this matter had been pleaded specially, the defendant would clearly have held the affirmative of the issue, and the burden of proof would have been upon him. That burden cannot be changed by the great latitude of defence which is allowed in this action under the plea of *non assumpsit*. The substance of the allegation to be tried, rather than the particular form of the pleading, must determine where the *onus* lies; especially in those actions where the defendant is not required to plead the particular matter on which he intends to rely. (2 *Ev. Poth.* 125. *Cowen & Hill's Notes to Phil. Ev.* 475 to 478, and cases there cited.)

It is of course unnecessary to examine the other questions made by the bill of exceptions.

New trial granted.



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The Poople v. Nevins.

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THE PEOPLE, *ex rel.* Johnson, vs. NEVINS.

an a proceeding to compel an attorney of this court to pay over moneys collected for his client, a rule was entered which recited the filing of interrogatories, together with the fact of the defendant having answered; and then, after referring it to the clerk forthwith to ascertain and report the costs, &c., and the amount directed by a previous order in the same matter to be paid by the defendant, went on to fine him in the amount so to be reported, and ordered that he be committed to the custody of the sheriff, until that sum, as well as the costs and expenses of the commitment, were paid: *Held*, that the report having been filed the next day, a certified copy thereof, and of the said rule, were sufficient to authorize the sheriff to arrest and imprison the defendant; and a discharge from the imprisonment, granted by a supreme court commissioner, was reversed.

The sum for the non-payment of which a commitment is ordered, need not be named in the order, but may be ascertained through a reference thereby directed to the proper officer; and the officer's report, when perfected, though made after the order, is to be regarded as a part of it.

A sheriff's return of commitment, to a writ of *habeas corpus*, should be construed liberally.

The jurisdiction of *courts of record* as to the *person*, in cases of commitment for contempt, is to be intended.

A rule of a *court of record* that a defendant be committed for contempt, need not recite the prior proceedings; if it is such a rule as the court might legally make under any supposable state of circumstances, all jurisdictional steps and matters of regularity are to be presumed.

For defects in respect to matters of *regularity*, the only remedy is by motion.

*Semble*, that even on *certiorari* to remove a summary conviction by an *inferior court*, the superior court will intend the proper notice to acquire jurisdiction.

Where the proceedings of a superior court are drawn in question collaterally, before an inferior, the latter has no power to examine the *regularity* of the jurisdictional steps.

Jurisdiction of the person once acquired, by arrest under an attachment for contempt, continues while the case is under examination, whether the defendant remain in *actual custody*, or not.

Under a non-bailable attachment, it is the duty of the sheriff to hold the defendant in custody till he is discharged in due form, bringing him before the court on the return of the writ.

Attorneys, &c. are, by legal fiction, deemed present in court during term time; and, *quere*, whether process is then necessary to warrant proceedings against them.

This court will take judicial notice that a person is one of its attorneys; and, *semble*, a supreme court commissioner, proceeding as such, should do the same.

On filing interrogatories and the defendant's answer thereto, and on motion of Mr. Taber, of counsel for the relator, and after hearing counsel opposed, it is ordered, that it be referred to the clerk of this court at Albany, forthwith to tax and assess the amount of the costs and expenses of the proceedings of the relator in this matter, and of the amount directed to be paid by the defendant under the order of

this court, a copy of which is annexed to the interrogatories in this cause. And, on filing the report of said taxation and assessment, this court ordered and adjudged, that a fine be, and hereby is imposed upon the said Thomas J. Nevins, to the amount of the sum reported by the said clerk as aforesaid, to indemnify the said relator, to whom the same is hereby ordered to be paid; and that the said Thomas J. Nevins be committed to the custody of the sheriff of the county of Erie, until the sum above mentioned, and the costs and expenses of the said commitment be paid."

“ *The People, ex rel. Ebenezer Johnson,* }  
v. }  
*Thomas J. Nevins.* }

I, John Keyes Paige,  
clerk of the supreme court at Albany, to whom it was referred,  
by rule of this court of the 10th instant, to assess the amount  
directed to be paid by the defendant to relator, by rule of this  
court granted on the 4th day of October last, and to file his re-  
port, &c., do report—it appears that on the 30th day of October,  
1839, the said Thomas J. Nevins, as attorney for John I. Fay  
against James Hollister, received for damages in said suit the  
sum of \$700,53; the said claim had been duly assigned to re-  
lator; that it further appears, that the costs of proceedings in  
this matter up to the time of issuing the attachment, and al-  
lowed by this court, amount to \$37,72; and that I have this  
day taxed the costs of relator, which have accrued upon the  
execution and return of attachment, at the sum of \$109,08.  
I further report, that I do allow the said sum received for  
damages, . . . . . \$700,53  
Interest on same from 4th day of October, 1838, to this  
day, being 3 months 7 days, being the time the order  
to pay was granted, . . . . . 13,29  
The costs on previous motions, . . . . . 37,72  
Costs on return of attachment taxed by me, . . . . . 109,08  

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Total, . . . . . \$860,60

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I do therefore report the whole amount this day, at the sum of eight hundred and sixty dollars and sixty cents.

JNO. KEYES PAIGE, Clk."

On this report being filed, January 11th, 1839, and the above rules and report being certified by the clerk, with this caption—"In Supreme Court, 10th January, 1839"—under his hand, and delivered to the sheriff of Erie, he, the sheriff, arrested Nevins, January 11th, in a public street in Albany, and committed him to the jail of Erie county. Thence he was brought before a commissioner of that county on *habeas corpus*; to which the sheriff returned the above mentioned certified copies as his authority.

The commissioner made an order discharging Nevins from custody; to reverse which order, the relator sued out a *certiorari*, to which the commissioner returned the above proceedings before him.

A. Taber, for the relator.

M. T. Reynolds, contra.

By the Court, COWEN, J. The counsel for the defendant justifies his discharge, not because this court had not jurisdiction in fact, but because it did not appear on the papers in the hands of the sheriff that it had been duly exercised; in short, because the authority or warrant to arrest and commit was formally defective. The objections are, *first*, that the defendant, being out of court, could not be arrested without *writ*; or, if he could be arrested by *rule*, this was defective in not reciting and showing jurisdiction: and *second*, that the rule was irregular on its face, in not being for a sum certain, nor showing a demand of the money previous to the conviction. The objections as to jurisdiction of the person, and regularity, are all answerable by general arguments showing that both must be intended; though I think that both suffi-

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ciently appear on the return. Whether we have the power to commit by rule, depends on the inquiry, whether we had it at the common law, and whether it is left to us by the revised statutes.

The rule in this case was, in substance, that the defendant Nevins be committed to the custody of the sheriff of Erie, till he paid a fine of \$860,60, imposed upon him by that rule. The sum for the non-payment of which a man is committed for contempt, should no doubt be specified by the rule, but that may be either directly, or by reference to a proceeding taken to ascertain the amount through the proper officer, whose report, on its being filed and confirmed, or not objected to, becomes the act of the court, and is then to be read as part of the rule. *Id certum est quod certum reddi potest.* Here was a return by the sheriff of the commitment and cause, which was plain enough ; and even more full and certain than appears on common process, such as a *capias*. The least liberality of intendment by the commissioner, would have made the case equivalent to a full recital of all the proceedings. In *Rex v. Bethel*, (5 *Mod.* 19, 23,) the court of king's bench were asked, on *habeas corpus*, to construe a return of the sheriff very strictly ; but they would not. They read it liberally, and intended much, to make the commitment, which appeared to be on a short order, good. Eyre, J. said : "It might rid all the jails in the kingdom, if the jailor's return should be taken so strictly." We shall see hereafter that the proceedings of all courts of record, in cases of commitment for contempt, stand on the same footing, in this respect, as commitments of the English house of commons. Of these, a learned judge has lately said, if it appear that the case adjudicated upon, *may be* one of privilege or contempt, it must be presumed that it was so. (*Coleridge, J. in Stockdale v. Hansard*, 9 *Adolph. & Ellis*, 1 ; 36 *Engl. Com. Law R.* 122, S. C.)

That this court had jurisdiction of the person must be intended. Among the requisites for acquiring that jurisdiction, in a proceeding for contempt, is the presence of

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the defendant in court, either voluntarily, or by compulsion under process of attachment. On his thus appearing, this court has the power to fine, and to imprison till the fine be paid. That is ordinarily done on the defendant's answer to interrogatories and other proofs touching the matter in question. But it is not necessary to the validity of the rule, that all these things should be recited on its face. Such a thing is never thought of. The rule is commonly very brief; and if it be such as this court is authorized to make under any given concurrence of circumstances, all jurisdictional steps and matters of regularity are to be presumed. If there be any defect in the latter respect, the only course is to raise the question by motion. When the proceeding of a court of general jurisdiction is drawn in question collaterally, before an inferior officer, he has no power to examine whether the steps which were necessary to warrant it have been regular. A contrary doctrine would turn a *habeas corpus* into a writ of error to revise the proceedings of the various courts of record. We have of late, in several instances, refused to interfere on such grounds with the proceedings of courts of common pleas, even on writ of error. *Hart v. Seixas*, (21 *Wendell*, 40, 45,) is one instance, (and *vide id.* 57, *note.*) In the course of our researches we found that even in respect to inferior jurisdictions, the same principles prevailed to a very considerable extent. On *certiorari* to remove a summary conviction before a magistrate, though a criminal case, the superior court will intend that he had acquired jurisdiction by the proper notice, or other form adapted to the nature of the case. (*Id.* 47, and cases there cited.) *A fortiori*, where the court, whose proceeding is in question, has general jurisdiction, not only of the person and subject matter, but territorially throughout the state. In the *King v. Bethel*, (5 *Mod.* 19,) before cited, the prisoner was committed on an order that he should remain in custody—not that he should be committed—and all the judges agreed that, though the order was erroneous, in not directly saying, “let him be committed;” yet, it should be intended

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that he was already in custody, and then the words "let him remain," were equivalent to a *commitment*. Even Holt, the strictest judge in the world on such jurisdictional matters, concurred clearly in this; and the court declined interfering on *habeas corpus*.

Take, for instance, the little slip called a bail-piece, on which a man may be arrested, and, under a short *committitur* endorsed by a judge, incarcerated either before or after judgment, at the pleasure of his manucaptors. Would a commissioner have power, on a sheriff returning these upon a *habeas corpus*, to look behind them, and inquire whether the court in which the bail-piece was taken had acquired jurisdiction, or proceeded regularly? This will not be pretended. If there should be any thing so irregular that the arrest and commitment were unwarranted, the course of every intelligent lawyer would be an application to the court. Who ever thought it necessary that jurisdictional steps should appear on such a piece of paper? And yet, it is the most authoritative warrant for an arrest and commitment, of any instrument known to the law.

I need scarcely say that a rule of court convicting, fining and ordering an imprisonment for a contempt, is a proceeding of much more frequent occurrence; and even less open to question. This was admitted on the argument, provided the prisoner be in court. (*Wyatt*, 140. *Ex parte Whitchurch*, 1 *Atk.* 57.) I presume it will hardly be contended that this commissioner had the power to inquire whether Nevins was *physically* in court when he was convicted. He might have been so; and if that were necessary, it was the duty of the commissioner to intend that he was there. But that was not necessary. The process to bring the party before the court is attachment. (4 *Bl. Comm.* 287.) An arrest under this process confers jurisdiction, which continues while his case is in a course of examination, he being either actually in court, or ordered to stand committed, or let out on bail. (4 *Bl. Comm.* 287.) The bare endorsement of an appearance on some kinds of mesne process, brings and continues a defendant in court; and so the return of a sheriff of *cepi corpus*, fol-

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lowed by special bail. Under a non-bailable attachment, it is the business of the sheriff to hold the defendant in custody till he is discharged in due and ordinary course of law, bringing him before the court on the return of the writ. The defendant is sometimes, in such case, an attorney, who, as in the instant before us, is proceeded against for neglect to pay over moneys collected for his client. His name is on the roll, and so long as it is there, he is legally and customarily denominated a gentleman; and because a confiding sheriff happens to treat him as such, by allowing him to go into the street, does it follow that this shall oust the court of its jurisdiction? If that be so, there is a good deal of difficulty to see how any court can sustain its jurisdiction through the course of a protracted examination. Should it adjourn to another day, the prisoner must, in the meantime, be personally removed from its presence, and peradventure be part of the time in the street. This would be fatal to jurisdiction, should he refuse, voluntarily, to return! The difficulty could hardly be obviated by ordering the prisoner into close custody with the sheriff, or into the jail of the immediate county. And surely, on the principle in question, our right to imprison on a bail piece would be absolutely subverted. Yet it has been supposed to continue, even though the defendant depart from the state.

Again: attorneys, counsel and other officers of the court, are, in fiction and judgment of law, always deemed, not only like a man out on bail, to be within the jurisdiction of the court, but, during term, present in court; and they are so expressly treated in pleading. (1 *Tidd's Pr.* 77, *Am. ed.* of 1807. 2 *Chit. Plead.* 29, *Am. ed.* 1828.) They are always, in term time, as much within the jurisdiction of the courts in which they are licensed, as a prisoner in custody of the sheriff or marshal. (*Vid.* 6 *John. R.* 478.) No process therefore against either is, perhaps, in strictness necessary to bring them into court. That a man is an attorney, is a fact of which judicial notice may and should be taken, not only by the court, but by



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sheriffs and commissioners when he is brought before them on *habeas corpus*. That a rule peremptory may be made against him to pay such sum as shall be taxed by the clerk, even before attachment, is shown by an instance in Hand's rules. The rule was, "That the said Mr. A. B. (the attorney) do forthwith pay, &c. the costs, &c. [in the cause] to be taxed by Mr. Benton; and it is referred to Mr. Benton to tax, &c. [the costs of the motion,] which costs, *when* taxed, shall also be paid," &c. Mr. Hand says, the course is first to make a rule to answer the complaint; and afterwards *such ultimate rule thereon as the justice of the case may require*. *Hand's Rules*, 125 to 127.) I mention this also to show that, in practice, a rule is deemed sufficiently certain in the sum to be paid, where it refers to it as yet to be ascertained by the clerk. It cannot be denied that we might have ordered Mr. Nevins to be committed till he should pay a certain sum, for instance \$1000, he to be discharged on paying a less sum to be ascertained by the clerk. But it is objected, that we made the amount depend on a report subsequent. Any substantial difference is not perceived, however. In either case the committing officer must be furnished with a copy of the report, to show on what terms he may allow the prisoner to go at large. In the case at bar, were we to lay aside all intendment, and take the rule strictly, it shows that the defendant had answered interrogatories, was heard by counsel, whereupon the reference was made, on filing the report upon which the amount of the fine was fixed, and the defendant ordered to pay accordingly or in default to be committed to the sheriff. It seems a forced and unnatural construction, to suppose that he was not all the time, during which these proceedings and orders were passing, actually within the jurisdiction of the court, receiving its directions in person or through his counsel, according to the usual course when a man is brought in on attachment. Blackstone says, that when thus brought in, he must either stand committed, or put in bail, in order to answer upon oath such interrogatories as shall be administered to him. (4 *Black. Comm.* 287.)

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And we have the authority of no less a man than Lord Hardwicke for saying, that when an order to stand committed is pronounced after actual sentence for a contempt, against one in court, he is *instantly a prisoner*, and the warden may take him away to jail directly. (*Whitchurch's case*, 1 *Atk.* 57.) Clearly, if he escape into the street, the sheriff may pursue him. In *Whitchurch's case*, it was held he might take him on Sunday, because his going out of court was an escape; and the arrest was not original, but a mere continuation of the former imprisonment. In the case before us, the man is told, "You must pay the sum due with costs to be ascertained, or your imprisonment must be continued." In other words, "we cannot discharge you till that act of justice is done." The course pursued seems to have been governed by the 2 *R. S.* 443, 2d ed. § 21, which requires, that "a fine shall be imposed sufficient to indemnify such party [the party injured] and to satisfy his costs and expenses, which shall be paid over to him on the order of the court." These were directed to be ascertained accordingly by the proper officer, and to be paid, and that the defendant be committed till they were so paid. He might have been detained, no doubt, by a remand on the attachment, till the report came in, and even till the next term; but the more speedy, and therefore the more beneficial course, was taken for him, by ascertaining forthwith the amount. *Non constat* but he preferred this course himself, and even suggested it. And it is enough, so far as the validity of the rule is concerned, to see that this court had power to make the rule. The authorities are express, that at common law it need not contain any recital of the proceedings, nor indeed set forth any specific ground of commitment, (*vid. the form in Rex v. Beardmore*, 2 *Burr.* 792, 797,) though the revised statutes certainly do require that the ground should appear.

The common law of the case, was considered and laid down in *Regina v. Paty*, (2 *Ld. Raym.* 1105,) as long ago as the reign of Queen Anne, and has since been followed by the English courts. There the king's bench

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were called on to discharge Paty on *habeas corpus*, because he had been illegally committed by the house of commons. And various exceptions of form were taken to the speaker's warrant; such as that it did not allege a sufficient cause, and was not under seal, &c. Gould, J., said, had the commitment been by an inferior court, it would have been bad, because it did not show a sufficient cause. But the commons, *being a superior court*, it was *not reversible for form*. Powys, J., said, commitments by a court need not be under hand and seal. He adds, "if all commitments for contempt, even those by this court, should come to be scanned, they would not hold water. Our warrants are short, as *for a contempt*, or *a contempt in such a cause*. The house of commons is a great court; and all things done by them, are *to be intended to be rite acta*; and the matter need not be so specially recited in their warrants; *by the same reason as we commit people by a rule of court of two lines*; and such commitments are held good, *because it is to be intended that we understand what we do*." Powell, J., mentions the case even of an inferior court, the ecclesiastical, and says, if they should imprison for a supposed offence which the king's bench had adjudged not to be so; yet *habeas corpus* would not lie for the error, inasmuch as the court had power to decide what was an offence under the ecclesiastical law. And see per Rolle, J., *Anon.*, (*Styles*, 129,) *S. P.*, as to discharging by *habeas corpus* on the ground that the court of admiralty, or a court of equity, had not jurisdiction. Powell, J., adds, in the case quoted from Lord Raymond, that the parliament being a superior court to the king's bench, must be the only and final judges of the privileges, order or custom of parliament. But if the king's bench should discharge persons on *habeas corpus*, committed for breach of privilege, that would be to judge of what belonged peculiarly to another and a superior court. He cites Lord Shaftesbury's case; and denies that the king's bench had any jurisdiction to examine a commitment by the house of commons. All the judges of England, except Holt, concurred that the

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king's bench could not interfere; for Holt himself says there had been a conference. The same question came again to be considered in *The Mayor of London's case*, (3 Wils. 188;) and it was agreed by the C. P., that in cases of commitments for contempt by the lords or commons, or by any other court of general jurisdiction, no other court had power to interfere and relieve by *habeas corpus*, or in any other way, because there was no appeal. De Grey, Ch. J., said, "In case of a commitment by this court, or the king's bench, there is no appeal." Blackstone, J., said, "The sole adjudication of contempts and the punishment thereof in any manner, belongs exclusively and without interfering, to each respective court;" i. e. the superior courts. He adds, "infinite confusion and disorder would follow, if courts could, by writs of *habeas corpus*, examine and determine the contempts of others."

I certainly do not, at this day, claim the utmost latitude allowed by these cases. I will not say that no cause need be assigned in the commitment. But where a cause is assigned in substance, even if it be without technical words, I do deny, on the authority of these cases, that, for a mere defect of form, the commissioner has any power whatever to interfere. He has no jurisdiction to say whether the form were proper or not. The commissioner, in this case, saw that Nevins had, by this court, been ordered to jail for not paying the money. And he was bound to know that he had no jurisdiction.

A mere defect of form would be no cause even for *us* to discharge on motion. Such defects in process are always amended in civil proceedings to collect moneys, whenever an application is made for a rule to amend. In the Lord Mayor's case, Blackstone, J. said: "It would occasion the utmost confusion, if every court of this hall should have the power to examine the commitments of the other courts of the hall, for contempts; so that the judgment and commitment of each respective court, as to contempts, must be final and without control. It is a confidence that may, with perfect safety and security, be reposed in the judges

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and houses of parliament." (*Vide Platt, senator, in Yates v. Lansing*, 9 John. R. 421; and *Gist v. Bowman*, 2 Bay, 182.)

It was insisted at the bar, that here was no conviction of a contempt by Nevins, specified in the rule. If disobedience to an order of this court be a contempt, then here is one plainly expressed. The rule mentions a previous order to pay, which had not been complied with. It is, as said before, the very case of contempt mentioned in 2 R. S. 443, § 21. The discharge was, at the utmost, founded on a pretence that the proceedings wanted form. I desire not to be misunderstood. I admit that, in respect to the naked right of a commissioner to revise the question of jurisdiction, the English doctrine may be considered as slightly qualified by *Yates v. The People*, (6 John. R. 337.) There, on its appearing positively by the return to a *habeas corpus*, that chancery had convicted as for a contempt, when, as the commissioner thought, there had been none, he was allowed to overrule the court, and discharge the prisoner. Probably, the revised statutes mean to follow that case, by giving a similar power in respect to these convictions by all courts, courts even of general jurisdiction. It is not necessary for me to deny that they do. It is proper that I should, in the first place, examine some statutory objections of a different sort, which have been urged against this conviction; leaving it to stand, that on return to a *habeas corpus*, showing we had raised a new case of contempt, warranted neither by precedent, principle, nor statute, the commissioner might pronounce our order to be a nullity.

I infer from the course of the argument in behalf of Mr. Nevins, that the commissioner was governed mainly by supposing that this was a commitment without process. We were told loudly that we had violated the revised statutes, in committing by *rule* and not by *writ*. Perhaps, if the statute has unequivocally ousted us of all authority to commit by *rule*, we must then, *quoad hoc*, be considered

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a court of inferior jurisdiction, which, it is conceded, has no power to commit, even for a contempt, without a regular warrant in writing. (*Mayhew v. Locke*, 2 Marsh. 377. 7 Taunt. 63, S. C.) But we have already seen that, at common law, courts of record might commit by *rule*. And in the case last cited, it was agreed that the chief justice might commit a man by mere oral direction to the marshal; and this for a general cause, e. g. to *answer whatever might be objected against him*. (*Throgmorton v. Allen*, 2 Rolle's Abr. Trespass, (C.) p. 558.) On the latter case being cited, in *Mayhew v. Locke*, Gibbs, C. J. remarked according to Marshall's report—"Was that a commitment by the chief justice in court, or out of it? But I should think the latter; because, if it had been in court, it would have been recorded by the officer immediately; and there could have been no doubt about it." In 1 Burn's Just. 604, (22d ed., tit. Commitment, § 3,) after saying that a justice's warrant should be written, &c., in a certain form, and sealed, it is added, "But this must not be intended of a commitment by the sessions or other court of record; for there, the *record itself* or the *memorial* thereof, *which may at any time be entered of record*, is sufficient without any warrant under seal." But we are reminded of what was said by Clinton, senator, in *Yates v. The People*, (6 John. R. 513,) viz., that "wherever a man is deprived of his personal liberty, our law seems to require the solemnity of a writ or warrant," citing *Furlong v. Bray*, 2 Keb. 711, 2 Saund. 182, and 1 Mod. 272. Such a restriction would take away the power of special bail, the power to arrest on suspicion, the power of watchmen, the power to arrest a man for disturbing a court, or to arrest an open rioter or disturber of the peace; even a man attempting to rob or murder, or a mad man scattering fire-brands. The learned senator admitted the distinction to be quite unimportant; and when the case came up in another shape, (*Yates v. Lansing*, 9 John. R. 416,) Platt, senator, (afterwards Mr. Justice Platt,) denied the position, saying expressly that *courts of record* may commit by *order* or by *writ*. What

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ever can be made of *Furlong v. Bray*, against the power of the court of chancery to imprison without writ, it was, in truth, expressly adjudged by the K. B. so long ago as the 39 Eliz. that *chancery may imprison by order, without writ, on conviction for a contempt.* (*Taylor et Beale, 2 Roll. Abr. 559, title, Imprisonment justifiable by officers, (D.) pl. 3.*) Lord Hale says, "the power of a justice of the peace, differs from the power of a court; for *the court of king's bench may commit by order*, and so may the court of sessions of the peace, because there is or ought to be a record of the commitment." The power at common law, therefore, cannot be questioned. The dictum of Mr. Clinton, was a mere *semble*, founded on a case which had been contradicted by the whole current of authority and practice, both before and since it was decided.

We now come to the revised statutes, which have in no instance required courts to pursue a different practice from the common law, at least, not in the institution and pursuit of the prosecution to conviction. I speak particularly of proceedings like those now in question, for a contempt to enforce civil remedies and protect the rights of parties in civil actions. (2 R. S. 440, 2d ed.) The provisions as to preliminary proceedings are not materially different in respect to criminal contempts. (*Id.* 207, 8.) Contempts in presence of the courts, are made subjects of conviction without previous process, and all other contempts *may be* pursued as at common law: that is, by rule to show cause, followed by attachment, or by attachment absolute in the first instance. (*Id.* 441, § 2, 3, 5.) These three sections furnish the general rule, and the intermediate fourth section forms no exception. That relates to the more ordinary case of a rule to pay costs, either on granting or refusing a motion, or the costs or other sum of money on a rule to show cause, or on attachment. It gives the courts more power, in the ordinary case, and in the case of a rule to show cause, than was usually exercised before. They commonly required an affidavit of demand and non-payment, which was followed



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by an attachment and interrogatories. These last, the 4th section deemed a useless circuitry; and, therefore, it gives an execution forthwith, which it calls a *precept*. The statute no where forbids the court to proceed in the former common law mode; but merely provides, that it *may commit* in a particular form short of that. We are told that, in *The People, ex rel. Lovett, v. Rogers*, (2 *Paige*, 103,) the learned chancellor granted a *precept* in a case like the present, even after conviction on attachment and answer to interrogatories. The necessity of such a step was not, however, debated. The *precept* would not vitiate the order to commit, and was certainly well enough in practice, for more abundant caution. We are put to inquire, whether the statute has taken away the power to act without it. With regard to the form of conviction, as whether by rule or not, the statute has no way interposed, nor pretended to interpose; though it certainly has in respect to the *commitment*, both in criminal and civil cases. In criminal cases, it provides, that the *order or warrant* of commitment shall specify the particular circumstances of the offence. (*Id.* 208, § 13.) In civil cases, it is made conformable to the object of the proceeding. If it be to enforce the performance of a duty, the statute says, that the *order* and *process* of commitment shall specify the act or duty to be performed. (*Id.* 444, § 24.) In other cases, the *order* and *process* of commitment shall specify the duration of the imprisonment. (§ 25.) In the case at bar, the duty to be performed, and the duration of the imprisonment, are both specified in the rule. But it is supposed that the word *process*, necessarily means a *writ* or *warrant*; and implies, that there cannot be any imprisonment without it. I admit that the word *process* usually signifies a writ or warrant; but it also means a good deal more. It means all the proceedings in a cause, after the first step. (*Tomlins' Dict. tit. Process.*) In that sense, it would comprehend a *rule* or *order*. But taken more strictly, there is no doubt that a *rule* or *order* to commit, as plainly comes within the meaning of the word *process*, as a *precept* under the fourth



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section, or a *capias ad respondendum* or an execution. The definition of *process*, given by Lord Coke, comprehends any lawful warrant, authority or proceeding, by which a man may be arrested. He says, "*Process* of law is twofold, viz. by the king's *writ*, or by due proceeding and warrant either in deed or in law, *without writ*." (2 *Inst.* 51, 2.) By *warrant* of law, he comprehends any authority of law, as is plain by the instances which he gives. He adds, "If treason or felony be done, and one hath just cause of suspicion, this is a good cause and *warrant* in law to arrest any man." Again: "A watchman may arrest a night walker by *warrant* in law." And he concludes by saying, that "a commitment by lawful warrant, either in deed or in law, is accounted in law due *process* or proceeding in law." (*Vid. also* 6 *John. R.* 478, and the books there cited by *Lansing, chancellor, in Yates v. The People.*) The constitution says, that no person shall be deprived of his liberty without due *process* of law. Yet, who ever supposed that this took away the right to arrest on a bail piece, or for an escape without a sealed warrant, and so of many cases. We have already seen, that a rule to stand committed has always been a very common warrant for the sheriff to commit. It is, therefore, *process*; and the statute saying, *order* and *process* of commitment, is either no more than a repetition, or, which is more probable, the statute is to be understood distributively, viz. that when a *precept* issues, which would more commonly be called *process*, it should fix the time, &c.; and when the proceeding is by rule or order, this should also do the same thing. It cannot be, that this accidental dropping in of an equivocal word, was intended to deprive all courts of their known and acknowledged power to commit except in a new form never before required. Had any such thing been intended, it seems to me the provision would have been direct and explicit.

Then the statute of *habeas corpus* declares, that when, on the return of the writ, there shall appear to have been a contempt plainly and specifically charged in the *commit*

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*ment*, by some court, officer or body, having authority to commit for the contempt so charged, it shall be the duty of the court, or officer, before whom the writ is returnable, forthwith to remand the prisoner, if the time of detention have not expired. (2 R. S. 469, 470, 2d ed.) That is this case; and the law is the same in relation to all other commitments absolute. Whenever the commissioner sees that the prisoner is properly detained, it is his duty to remand; that is, whenever he is properly committed and holden by authority of law, unless in a bailable case where bail is offered and receivable; and this, whether there be any warrant *in deed*, that is, a formal warrant under hand and seal, or warrant *in law*, which means any legal authority. The words *legal commitment*, mean any act of committing, justifiable by the law of the land.

On the whole, we are clear, that the commissioner acted in this case before us entirely without jurisdiction. Even had there been no entry at the time of the arrest, it might have been made, we have seen, at any time, according to the truth of the case; and if the imprisonment were not warrantable, we would have discharged the prisoner on motion. Proceedings like this should, in point of form, be finally judged of by the tribunal where they originate. The commitment cannot detail the entire proceeding, so as fully to inform another court of the reasons why we punish for a contempt. We cannot be informed by the court of errors or chancery, through any process they could issue short of a long recital *in hæc verba*, of the reasons on which they may have acted in a similar case. We, therefore, could not interfere with their practice, and scarcely ever with their jurisdiction, on a *habeas corpus* returned before us.

We are of opinion that the proceedings of the commissioner should be reversed.

Ordered accordingly.

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Woodworth v. Barker.

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WOODWORTH vs. BARKER.

Where one party to a suit is sworn to prove the loss of a written instrument, with a view to secondary evidence, though the adverse party may be examined to disprove the loss, and account for the instrument, yet he cannot, under color of this right, give testimony denying directly or indirectly the former existence of the instrument, or the matters designed to be evinced by it.

The party affirming the loss cannot be sworn until after the former existence of the instrument has been established by independent evidence; and when sworn, his testimony as well as that of his adversary, is, in general, to be confined to the single question of loss.

*Quere*, however, whether the parties may not in certain cases go beyond this, and even present a case of conflicting testimony between them, so blended with other matters, as to render the whole a jury question.

But, in general, testimony relating to the loss of an instrument, with a view to secondary evidence, is to be addressed to, and passed upon, by *the court*, and not *the jury*.

MOTION by defendant to set aside report of referees in favor of the plaintiff for \$669,07. The defendant entered into a contract for the sale and delivery of lumber to the plaintiff in the year 1835, and again in 1836; large quantities of lumber were delivered by the defendant, and payments made by the plaintiff from time to time. Among other payments, the sum of \$900 was paid to the defendant's son, John H. Barker, on the 7th of October, 1835, for which the son gave a receipt, produced on the hearing. The body of this receipt was in the hand-writing of the plaintiff. Bentley R. Sherman testified that he paid \$900 to the defendant personally, by direction of the plaintiff, and took the defendant's receipt for the amount, the body of which was in the hand-writing of the witness. He was quite confident that this payment was made in July, and he believed on the 20th July, 1835. He delivered the receipt to the plaintiff, and afterwards saw it in his possession when the parties were examining their accounts with a view to a settlement. The controversy between the parties was in relation to this sum of \$900; the plaintiff insisting that there had been *two* payments of \$900 each

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and the defendant insisting that there had been but *one* such payment—that for which the receipt of 7th October, 1835, was given. If the plaintiff was right, he had overpaid for the lumber, and was entitled to recover back the amount of overpayment; if the defendant was right, a balance was still due to him. Several witnesses were examined on both sides.

After proving the payment and receipt in July, the plaintiff was himself sworn *to prove the loss of that receipt*. He said he thought the receipt was lost—that he had repeatedly searched for it and could not find it—that he had had the receipt which the witness Sherman had spoken of. At the suggestion of the defendant's counsel, the defendant was afterwards sworn *to disprove the loss of the receipt*. Several questions were put to the defendant by his counsel, all of which were calculated to draw forth answers affirming, either directly or indirectly, that *no such receipt had ever existed*, and that no such payment had ever been made. None of the questions admitted or assumed that there had been such a receipt or proposed to account for it. The referees decided that the questions should not be answered.

*S. Stevens*, for defendant

*A. Taber*, for plaintiff.

*By the Court*, BRONSON, J. When one party to an action has been sworn to prove the loss of a written instrument, "the adverse party may also be examined by the court on oath, *to disprove such loss, and to account for such instrument.*" (2 R. S. 406, § 74.) The defendant did not propose, on his own oath, to disprove the loss of the instrument in any other way than by *denying that there ever had been such a receipt*, and by stating facts inconsistent with the allegation that such a receipt had never existed. I think the referees were right in not allowing the defendant to answer the questions put to him by his counsel. The

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plaintiff was not a competent witness upon the question whether such a receipt had ever been given. He could not be sworn until the original existence of the instrument had been satisfactorily established by other evidence; and when sworn, he could only be examined to the single question of *loss*. And it is upon the question of *loss*, and that only, that the defendant was authorized, by his own oath, to give rebutting evidence. The statute only authorizes his examination, "*to disprove such loss.*" The additional words—"and to account for such instrument"—only express the same thing in a different form; or rather, point out the way in which the loss may be disproved—to wit, by accounting for it.

The evidence on one side is, *to prove* the loss; on the other, it is *to disprove* the loss. Both parties must begin with the assumption that the instrument did once exist. The usual evidence of loss is, that the party who had the paper has made diligent search for it in the proper place without being able to find it, or that it was destroyed by accident. The answer of the other party may be, that the instrument was delivered up to him to be cancelled, and was destroyed after it had ceased to be an obligatory contract.

When a man pays a note, it is not unusual to destroy the instrument, without taking any acquittance from the creditor. If the latter should afterwards attempt to recover the amount of the note, on proving the original existence and contents of the instrument, with the addition of his own oath that it had been lost, it would be very proper to allow the defendant to answer the plaintiff on the question of loss, by accounting for the instrument. And in such a case, it may be that the defendant should be allowed to go somewhat beyond the most direct evidence to disprove the loss, and to state how it happened that the plaintiff consented to give up the note, to wit, that it had been paid; and that would, perhaps, open the inquiry, how and when was it paid? And then it would seem that the other party should be permitted to answer as to those matters. In this way cases may arise where there will be such a conflict in the

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statements of the parties as to render it extremely difficult for the court—to whom, and not to the jury, the evidence of loss is addressed—to decide on the propriety of admitting secondary evidence of the contents of the instrument. And if the parties are allowed to go so far as to speak of payment, the collateral question of loss, which properly belongs to the court, may become so intimately connected with other things, as to render it nearly or quite necessary to refer the whole matter to the jury.

But we intend to decide nothing concerning those points on the present occasion. I have only glanced at them, for the purpose of showing how difficulties may arise the moment the parties are heard beyond the most direct evidence to prove or disprove the loss of the instrument. We are asked in this case to go much farther than in the one which has been supposed. In the case of the paid note, the defendant admits the original existence of the instrument, and disproves the alleged loss, by showing how it came to be destroyed. But here, the defendant begins and ends with a denial of the original existence of the instrument. In that, he is not answering the plaintiff, but he is contradicting a disinterested witness by whom the original existence of the instrument had been proved before the plaintiff was or could be sworn. This would be allowing a party to the action, who is competent only in relation to collateral facts, to become a witness in his own favor upon the merits of the controversy. We ought, I think, to adhere closely to the statute, and only allow the defendant “to disprove such loss,” or what is the same thing, “to account for such instrument.”

It is true, as was suggested at the bar, that the oath of one party that an instrument is lost, may contain an implication, more or less strong, that the instrument did once exist. But still, as the fact of existence must be first proved by other and competent testimony, it would, I think, be going too far to allow the other party to contradict that fact, under the notion that it was but an answer to the inference of existence springing out of the proof of loss.

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 Smith v. Benson.
 

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The question is undoubtedly one of considerable difficulty, but the best reflection I have been able to give to it has led to the conclusion that the referees decided correctly.

Motion denied.(a)

(a) That as a general rule, the party, on questions of this sort, is prohibited from testifying as to the merits, see *Adams v. Leland*, (7 Pick. 62 :) also the observations of Huston, J. in *Wood, &c. v. Connell*, (2 Whart. R. 542, 562.) Nor can his adversary, on cross-examination, *compel* him so to testify. (*Vasse v. Mifflin*, 4 Wash. C. C. R. 519, *semble*.)

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### SMITH & BRITTON vs. BENSON & PECK.

*Prima facie*, a building erected by one person on another's land, is to be treated as a *fixture*, and a part of the realty.

But if it be so erected, under an understanding or agreement that it may be removed at any time, it is then no part of the realty, but personal property, for the conversion of which trover will lie ; especially where it is only slightly fixed to the freehold. One deriving title from a person who had previously mortgaged a building, so erected, as personal property, is not in a situation to insist, as against the mortgagee, that it is a part of the freehold.

Nor is he at liberty to dispute the title of the mortgagor.

TROVER, for a building used as a grocery and dwelling house. The cause was tried at the Onondaga circuit, April 11th, 1839, before MOSELEY, C. Judge. The plaintiff's title was derived under a mortgage dated September 20th, 1837, from one Ladd, in which the building was described as situated on a lot belonging to the estate of I. Brackett and T. M. Wood, deceased ; and was treated in the mortgage as a chattel. The mortgage was in the usual form of instruments of that nature relating to personal property, being a sale, defeasible on payment. It provided that in case of default, &c. the mortgagees might enter, &c. and take and carry away, &c. and sell, &c.

The testimony as to the character of the building, and its connection with the premises on which it stood, showed, that it was set upon blocks or pins drove in the ground, and, as one witness said, was elevated above the sur

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face, and did not rest on the ground or on stones. Other witnesses testified to their belief that it rested on the ground, and said that there was a cellar under it; that a plank in the cellar standing end wise, had started the floor up; that the sills on the east side had settled into the ground; that the linter part in the rear rested on the ground; that there was a chimney in it, &c.

Ladd was in possession of the building when he gave the mortgage to the plaintiffs, occupying it as a grocery; and it had also been occupied as a dwelling.

The building was erected by one Brown, in 1828, who rented the ground on which it stood, of Brackett and Wood, with the understanding that he was to have three or six months notice to remove the building. The possession of the building had changed, passing from Wood down through Ladd to the present defendants.

The defendants purchased the building of Ladd, subject to the mortgage, the amount due on which was deducted from the purchase money; and the defendants had recognized the plaintiff's title in September, 1838.

The defendants gave in evidence a lease of the ground upon which the building stood, to Benson, one of the defendants, and R. Lee, for the term of two years from January 9th, 1838.

On the 10th of December, 1838, default having been made in respect to paying the moneys secured by the mortgage, and the defendants being in possession of the building, G. Lawrence as agent of the plaintiffs demanded possession from the defendants, who refused to surrender it.

The judge charged the jury that if they believed the building could be removed without injury to the freehold, and that it was built with a view to its being removed when the landlord required it, it was a chattel, and trover might be maintained for it. That, both parties claiming under Ladd, the defendants could not question the plaintiff's title.

The verdict being for the plaintiffs, the defendants now move for a new trial on a case.



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Smith v. Benson.

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*J. A. Spencer*, for the defendants.

*E. A. Brown*, for the plaintiffs.

*By the Court*, COWEN, J. The judge was clearly right with regard to the title of the plaintiffs; and the only question calling for consideration is, whether the building was a fixture in that sense which precludes the right to bring trover for it.

The building was slightly fixed to the freehold; and all parties—the owners of the lot on which it was built—the builder himself—Ladd the mortgagor who succeeded him and the plaintiffs, the mortgagees—regarded it as the subject of removal at any time; and when the mortgage came to be given by Ladd to the plaintiff, they treated it as a mere moveable thing, on a footing with other personal property. The defendants themselves took from Ladd; they stand in his shoes, and the case is the same as if they had given the mortgage themselves. Thus, both these parties agreed to consider it as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremoveable. *Prima facie*, such a building would be a fixture, and would not be removeable. The legal effect of putting it on another's land, would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them, by an express agreement. They have, in effect, stipulated, that the placing of this building on the ground of Brackett and Wood, should work nothing more towards changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainderman. And, surely, the parties may, by express agreement, do the same thing, and even more. If they agree, in terms, that a dwelling house shall, as between them, be considered strictly a personal chattel, it takes that character. And so of any equiv-

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shall agreement or understanding, which we think existed in this case between all the parties concerned.

The learned judge was right at the circuit; and the motion for a new trial should be denied.

New trial denied.

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THE PEOPLE vs. WEBB.

## THE SAME vs. THE SAME.

The venue in a criminal cause may be changed on motion of the public prosecutor, if it appear that a *fair and impartial trial* cannot be had, in the county where the indictment was found.

There is no fixed rule defining what shall or shall not be received, as proof of the fact that such trial cannot be had.

The venue may be changed, though there has been no *actual experiment* made, by way of trying the cause, or even empannelling a jury, in the county where the venue is laid.

The cases of *Bowman v. Ely*, (2 Wend. 250,) and *Messenger v. Holmes*, (12 id 223,) reviewed and explained.

R. COOPER, for the people, moved to change the venue from Otsego county to some county adjoining, on the ground that, previous to and about the time of the session of the oyer and terminer at which the indictments in these causes were expected to be tried, various publications had been issued and distributed among the inhabitants of the county of Otsego and the jurors summoned for the court, tending to prejudice their minds against the prosecutor in respect to the trials. It appeared by affidavits, that the indictments were for libels upon J. F. Cooper printed in the defendant's paper, (*The Courier and Enquirer*,) in the city of New-York, which the district attorney might have tried at the September oyer and terminer in 1840; about which time two of the articles, now made the main ground of the motion, were printed in another paper, called the *New World*, and transmitted through the post office to a number of the jurors summoned for the court. The defendant had been arraigned on both indictments at the September oyer and

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terminer, 1839 ; shortly after which, a letter appeared in his own paper, which had a partial circulation in Otsego, giving an account of the proceedings, calculated to prejudice the public mind against the prosecutor in respect to the trials. This, as Mr. Cooper now in his affidavit stated, from information and belief, had been sent, not only to regular subscribers in Otsego, but to others. And "from the resemblance in matter and substance between a good deal of that portion of the publications in the New World appearing to be editorial, and the letter in the defendant's paper, from other internal evidence, from general probabilities and from information," Mr. Cooper said, in his affidavit, "he entertained no doubt, that the defendant wrote and composed, or was privy to the writing and composing the publications in the New World, and in circulating the same in the county of Otsego;" adding—"This deponent avers that, confidently entertaining this opinion, he has avowed it in this affidavit, that the said defendant may purge himself by his own oath of all agency in the publication and circulation, in the county of Otsego, of said articles in the New World." The affidavit also stated, that the general course of a newspaper in Cooperstown, Otsego county, having a list of about 1200 subscribers, as deponent believed, had been marked by acrimony and hostility towards the complainant; and since the pendency of the indictments, had contained articles calculated to prejudice the people of the county against the prosecutions in question.

A motion was made by the district attorney to put off one of the trials at the September oyer and terminer, 1846, in consequence of the appearance of the publications. The motion was denied, and the district attorney ordered to proceed to trial, or enter a *nolli prosequi*. This, however, was not ordered until after inquiry among the jurors as to how many had received the publications in the New World. There were about forty jurors remaining after the allowance of excuses; and of these, about thirty, on inquiry by the presiding judge, admitted they had received

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the articles in the *New World*. Several of the publications were traced through the post office, to the hands of jurors who, it was admitted, were not regular subscribers for the paper.

Affidavits were read tending to show, from observation and general opinions, the degree of excitement occasioned by the publications, and by other causes, on the subject of the prosecutions.

The notice of the motion for October term, 1840, with copies of Mr. Cooper's affidavit, &c. and the *New World* containing the publications in that paper, were served on the defendant's attorney, October 10th, 1840; but no affidavit of the defendant was now produced.

Both indictments were removed into this court by *certiorari*; and one of them, by the district attorney, after the oyer and terminer (the circuit judge dissenting) had ordered that the trial should proceed or a *nolle prosequi* be entered, as above mentioned.

*L. J. Walworth*, contra, read a number of affidavits tending to show, from observation and opinion, that so far from there existing any excitement in Otsego dangerous to the complainant, the balance of the excitement was against the defendant; and opposed the motion, mainly on the ground that, before the court would take so strong a measure as to change the venue, it should appear, that the district attorney had called on the cause, and endeavored to obtain an impartial jury. That it was only after such endeavor and failure, that this court would change the venue. He cited *Bowman v. Ely* (2 *Wend.* 250,) and *Messenger v. Holmes*, (12 *id.* 203,) also 2 *R. S.* 613, 2d ed. § 85.

*S. S. Bowne*, in reply.

*Curia, per COWEN, J.* This is a motion to change the venue in two indictments for libels upon Mr. Cooper, from the county of Otsego to some adjoining county. The motion is made on the part of the people; and is founded on the

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alleged fact, that in consequence of a series of publications against the complainant, the public mind has become so much prejudiced against him in respect to the prosecutions, that a fair and impartial trial cannot be had in Otsego. The revised statutes, (2 R. S. 614, 2d ed. § 1,) implyly authorize us to make such a change for special cause, on an indictment coming into this court by *certiorari*. This is also an authority which we have at the common law. (1 *Chit. Cr. Law*, 201, *Am. ed.* of 1836. *The King v. Nottingham*, 4 *East*, 208. *The People v. Vermileya*, 7 *Cowen*, 139.)

The principle of the application is, therefore, correct; and the only question is, whether the affidavits for the motion are sufficient to raise a serious doubt that a fair and impartial trial can be had in Otsego.

It is shown, on the part of the prosecution, that the course of a newspaper in that county has been acrimonious against, and hostile to the prosecutor, in respect to these indictments. That this paper is published in the county town, and has a considerable subscription; that in the defendant's own paper, which has some circulation in that county, an article appeared with strictures adverse to the prosecutions. But especially, it is complained, that two successive copies of the *New World* were sent from the city of New-York, they containing two successive articles of a similar tendency. Copies of these articles were addressed, not only to residents of the county indiscriminately, but were directed to and received by many of the jurors who were summoned to attend the court, and who were, some of them at least, expected to participate in the trials. The *New World* was published by a neighbor of the defendant. The latter has not, however, any interest in that paper. But it is averred by the complainant in his affidavit, that from the resemblance of the articles in the *New World*, to the previous article in the defendant's paper, and other circumstances, he believes the defendant was personally concerned in the printing and circulation of the articles in the *New World*. This, the defendant has

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not denied. Indeed, he has made no affidavit in the matter, though a copy of the charge was served upon him several months ago. As to the weight of evidence, therefore, on which the motion rests, very little comment would seem to be necessary. The power of the three presses has been accidentally or purposely combined to work a prejudice in the public mind against the complainant, on the very questions involved in the prosecutions, and in a manner entirely adequate to the proposed effect. It must also be taken, I think, upon the defendant's silence under the charge, that he has aided in managing the most pernicious department of the machinery. It is extravagant to suppose, in the absence of proof, that any mere stranger to the prosecutions, however hostile to the complainant, would volunteer to practice upon the jurors who were summoned to attend court; that he would gratuitously commit an offence both morally and legally criminal, by tampering with the administration of justice.

The effort has been local, and it becomes our duty to obviate its influence, as far as may be in our power.

The cases cited, (2 *Wend.* 250, and 12 *id.* 203,) for the defendant, do not, as is supposed, fix on a definite species of evidence to sustain this sort of motion, and forbid a resort to other proof tending in its own nature to show that a fair and impartial trial cannot be had in the county where the indictments were found. The first case, indeed, ordered a change of venue to a county where it was thought, by several individuals, so much excitement prevailed against the plaintiff, that he could not have a fair and impartial trial. The decision, however, proceeded on the ground that the proof rested in speculative opinion. In the case last cited, the venue was changed, on the ground of excitement. In both cases, the learned judges speak of the attempt and failure to obtain an indifferent jury, as indicating the propriety of a change. The intimation in the last, that, without such an experiment, a change would be inadmissible, was entirely *obiter*. The only points established by these cases were, that mere speculative opinion is not suffi-

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cient evidence ; but that a failure of two successive juries in the same cause, to agree on a verdict, is. To make such an experiment essential, would seem to be quite dangerous. It is the very thing which the law seeks to avoid, when it is seen that the party may, and probably will be drawn into a trial by a jury, who, under an influence of which they may themselves be hardly conscious—an influence which perhaps no human sagacity can detect—may pronounce a verdict against him, and conclude his rights forever. Above all, would it be dangerous to require that he should risk his trial by a panel selected from a community already sought to be influenced by the course of the press ; that very panel being personally appealed to by the opposite party's own press, or one put in motion by him, or by some other person. It is impossible, until men shall have done with devices for getting up public excitement and turning it to their own account, to lay down, as in a category, precisely what shall and shall not be received for satisfactory proof of such excitement to a degree which may endanger the impartial administration of justice. All will agree, that when it is shown to exist, by whatever circumstances, the trial should be removed from the sphere of its probable influence by some means. Putting off the trial may be sufficient ; and the remedy must be confined to that when there is no power in the court to change the venue. If there be such a power, and the excitement appear to be extensive in the county where the venue is laid, it should be changed to another.

In these causes, we direct a rule that they be tried in the county of Montgomery.

**NELSON, C. J.** gave no opinion.

**Motion granted.**

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**Bronson v. Fitzhugh.**

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**BRONSON and others vs. FITZHUGH, impleaded with Throop**

Where F., one of two common carriers jointly charged by the plaintiffs with negligence, agreed with the plaintiffs by simple contract in writing, that if the latter would release T., the other carrier, it should not affect or impair any liability which he, F., might have incurred, or was subject to; and thereupon T. was released accordingly: *Held*, that F.'s agreement, not being under seal, did not qualify the release, so as to prevent its operating the discharge of both F. and T. from the original cause of action; and that the plaintiff's remedy was confined to the substituted agreement of F.

A release of one of several joint wrongdoers or contractors, in general discharges all. Otherwise, *semble*, where all are parties to the release, and those not in terms discharged, covenant in it to remain liable.

Whether, in case of the release of a joint debtor thus qualified, the remedy of the creditor is not confined to the new obligation arising out of the deed, *quere*.

The legal effect of a sealed contract cannot be varied by a contemporaneous written contract without seal.

ACTION on the case, tried before GRIDLEY, C. Judge, at the Oswego circuit, in June, 1839. The defendants were common carriers on lake Ontario, and were sued as such; the process, however, having been served upon Fitzhugh only. Before the suit was commenced, the defendant, Fitzhugh, had agreed in writing, without seal, with the plaintiffs, *in consideration that the plaintiffs would release Throop from all liability* in this matter, that any liability which he, Fitzhugh, might have incurred, or was subject to in the premises, *should in no respect be impaired or affected by the release*. The plaintiffs thereupon released Throop, who was a partner with Fitzhugh in the carrying business. Fitzhugh set up the release as a bar to the action. The judge decided in his favor, and the plaintiffs thereupon submitted to a nonsuit, which they now move to set aside.

*H. Brewster*, for plaintiffs.

*B. D. Noxon*, for defendant.

*By the Court*, BRONSON, J. If the plaintiffs had brought *assumpsit* instead of *case*, upon this contract of bailment,  
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there could have been no doubt, as a general proposition, that the release of one of the two joint contractors would have discharged both. But the form of the action cannot embarrass the question, for the rule is the same in relation to joint *wrongdoers*. The release of one discharges all. (*Litt.* § 376. *Co. Lit.* 232, a. *Kiffin's case*, *Comb.* 310, *S. C.* by the title of *Kiffin v. Willis & Evans*, 4 *Mod.* 379. *Cocke v. Jenor*, *Hob.* 66, pl. 69. *Corbell v. Barnes*, *Cro. Car.* 443, 444. *Patridge v. Emson*, *Noy's R.* 62, per *Popham & Fenner, Js.* *Bac. Abr. Release*, (G.) 7th *Lond. ed.* 1832. And see 3 *Leon.* 122, pl. 174; *Albany v. Mauny*, *Noy's R.* 5.) As to the reason of the rule, Coke says, that the deed shall be taken most strongly against the releasor. It is elsewhere said, that the release is a satisfaction in law, which is equal to a satisfaction in deed. (*Co. Litt.* 232, a. *Hob. R.* 66, pl. 69. *Bac. Abr. Release*, G.) If we unite these two remarks, the reason of the rule seems to be, that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been *satisfied for the wrong*; and after satisfaction, although it moved from only one of the tortfeasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.

The deed may, however, be so qualified, that the release of one will not have the effect of discharging all. When it relates to joint debtors, all of whom are parties to the deed, and the one who is not in terms released, agrees that he will still remain liable for the debt, that will qualify what would otherwise be the legal effect of the instrument, and it will only operate to discharge the debtor who is in terms released. (*Rogers v. Hosack*, 18 *Wendell*, 319.) But still there may be a question—at least in a court of law—in relation to the form of the remedy. When there is a *novation*, or the substitution of a new debt for an old one, the original debt is extinguished, and the remedy of the creditor is on the new contract. (1 *Poth. on Obl. (Evans)* 339.)

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In *Solly v. Forbes*, (2 *Brod. & Bing.* 38,) although both of the debtors were not parties to the release, the deed contained an express provision that it should not operate to discharge both, and that the plaintiff should be at liberty to sue both; and the action having been brought in that form, it was held that the release was not a bar. It is difficult to ascertain on what precise ground this case stands. Dallas, Ch. J. was careful to say, in conclusion, that "it was not intended to interfere with any received principles or established cases, but to decide only on *this particular case* with reference to its *special nature*." He then adds a "further caution," which I have not been able to comprehend.

In the case at bar, Fitzhugh was not a party to the release; nor did that instrument, as was the case in *Solly v. Forbes*, contain a provision that Throop might still be sued in the same manner as though no acquittance had been made. There is nothing to qualify the deed, except the written agreement of Fitzhugh, *without seal*, that the release should not impair or affect his liability; and it is well settled, as a general rule, that the legal effect and operation of a sealed contract cannot be controlled by a writing not under seal. (*Sec Allen v. Jaquish*, 21 *Wendell*, 628, and cases there cited.) This doctrine has been applied in cases like the one now under consideration. In *Cocks v. Nash*, (9 *Bing.* 341,) the plea was, that the plaintiff had released Mary Nash, who was a joint contractor with the defendant. The plaintiff replied that the release was executed "with the knowledge, privity and consent, and at the request of the defendant, and on the condition and express promise and undertaking, by and on the part of the defendant to the plaintiff, that the release should not operate to release the defendant from, or in any way prejudice the rights, claims or remedies of the plaintiff against the defendant." On demurrer, the replication was held bad, and judgment was given for the defendant, on the ground that the release could not be explained, or its legal effect varied by an agreement not under seal. *Tindal*, Ch. J. said: "The objection to the replication is, that it seeks, by the introduction of parol evidence, to put on an instrument un

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der seal a construction differing from the import of that instrument. That is an objection that was esteemed fatal as early as the time of Lord Coke." He then cites the *Countess of Rutland's case*, (5 Co. 26,) to show, that "every contract or agreement ought to be dissolved by matter of *as high a nature* as the first deed." In the principal case, it had been argued for the plaintiff, that for the purpose of giving effect to the intent of the *parties*, the instrument might be construed as a covenant not to sue Mary Nash, and then it would not operate to discharge the defendant. In answer to this, Gaselee, J. said: "No doubt a deed may be construed as a release, or a covenant not to sue, according to the intent of the parties *manifested by the contents of the deed*; but the plaintiff cannot show that intent *by parol evidence*. In all the cases cited, the court has extracted the meaning of the parties *from the deed itself*." It was added, by Bosanquet, J. that the release to Mary Nash "operates as a release to the defendant, *unless the plaintiff shows something to alter its effect*. Now a deed of release may be explained by *recital*, or other matter *contained in the same deed*, as appears by the case of *Solly v. Forbes*; but the court cannot look at an instrument of *a lower degree*, in explanation of an instrument under seal." The court of queen's bench, in the recent case of *Brooks v. Stuart*, (9 Adol. & Ellis, 854,) acted upon the same principle. The pleadings were similar to those in *Cocks v. Nash*, and Lord Denman, Ch. J. stopped the defendant's counsel, and said, "the replication is bad. It sets up a parol exception to an instrument under seal." Judgment was given for the defendant.

However much we may regret the necessity of turning the plaintiffs round to another action, that is the only alternative. They can only sue upon the substituted contract by which Fitzhugh agreed, for a sufficient consideration, that the release should not impair or affect his liability.

New trial denied.

END OF JANUARY TERM.

## DECISIONS OF CASES

ARGUED AT THE

## SPECIAL TERMS,

JANUARY, FEBRUARY AND MARCH, 1841.

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In the matter of opening TWENTY-NINTH STREET in the city of New-York, from the East to the North river.

Where D. owned four adjoining lots in the city of New-York and the land in front of them, the latter being designated on the commissioners' map as part of the site of a street; and, before the street was opened, he sold *three of the lots*, bounding the purchasers respectively by *the street*, conveying to them also all his interest in the land within the street adjoining their several lots, *subject to the use of the owners of the lots as a public street*: HELD, that his acts amounted to a dedication of the lands in the site of the street and to the extent of all the lots, to the public use; and therefore, upon the opening of the street, he was entitled to no more than nominal damages for the land taken therefor in front of the *fourth lot*.

*It seems*, that such a dedication would embrace all D.'s land in the site of the street to the extent of *the block where the lots sold are situated*.

*Quere*, whether it would extend to *all his lands in the site of the street*, however remote from the lots sold.

A motion to confirm the report of the commissioners of estimate and assessment, in the matter of opening streets in the city of New-York, cannot be opposed upon affidavits of *parties in interest*; e. g. persons who have been assessed for benefit.

R. EMMETT, for the corporation, moved the confirmation of the report of the commissioners of estimate and assessment, in the matter of opening Twenty-ninth street from the *East* to the *North* river.

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Matter of Twenty-ninth street, New-York.

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*Mr. Delaplaine*, on behalf of John F. Delaplaine, opposed the motion. The facts, as they were admitted on the argument, were as follows: Mr. Delaplaine owned four adjoining lots on the southerly side of the street, and most of the land in the street in front of those lots. In 1833 he sold and conveyed three of the lots, *bounding the purchasers by the street*. He also conveyed to the purchasers all his interest in the land in the street adjoining the three lots—the land to be *subject to the use of the owners of the lots as a public street*. He remained the owner of the fourth lot, and the land in the street in front of it. For the land in the street opposite this lot the commissioners allowed him \$79,48, which is less than its value, and on that ground Mr. Delaplaine objects to the report.

*W. Hunt* opposed the motion for confirmation, on behalf of Abel T. Anderson and Isaac Johnson—who have been assessed for benefits—on several grounds: but there was no proof of the facts on which they relied beyond their own affidavit, that “in their opinion the objections are true in substance and matter of fact.”

*Emmett* insisted, that, being parties in interest, their affidavit was not admissible. (*John and Cherry streets*, 19 *Wendell*, 659.)

*By the Court*, BRONSON, J. There is nothing in the case of Mr. Delaplaine to distinguish it, in principle, from other cases which have been before the court. (*Thirty-second street*, 19 *Wend.* 128, and cases there cited.) Having sold lots and bounded the purchasers by the street as it is laid down on the city map, he has adopted the map, and dedicated his land in the site of the street to the public use. He could have intended nothing less by his deeds than a declaration, that Twenty-ninth street was, and, so far as he was concerned, should remain a public highway. I do not say that this dedication will extend to all his lands in the site of the street, however remote from the lots sold;

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Matter of Thirty-Ninth street, New-York.

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but it will, I think, extend to all his lands in the same block—or in other words, to the next cross street or avenue on each side of the lots sold. The parties must have contemplated an outlet both ways.

Why the commissioners allowed Mr. Delaplaine more than a nominal sum, without giving him the full value of the land, does not appear: but he cannot complain that he has got too much.

In relation to Messrs. Anderson and Johnson the objection is taken, and must prevail, that there is no legal evidence of the facts on which they rely in resisting the motion for confirmation. They are parties in interest, and not competent witnesses in their own favor. (*John and Cherry streets, 19 Wendell, 659.*) The questions of law which their counsel wished to have considered, are not, therefore, properly before us.

Motion granted.

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In the matter of opening THIRTY-NINTH STREET in the city of New-York, from the East to the North river.

One who conveys lands in the city of New-York, bounding the purchaser by a street designated on the commissioners' map, thereby dedicates his adjoining land, in the site of the street, to the public use; so that, on the opening of the street, he will be entitled only to nominal damages therefor: and this, whether he bounds the purchaser by the *centre* of the street or the *side of it*, and though he sells in parcels *less than the usual size of city lots*.

B, who owned a small strip of land in that city, north of an unopened street designated on said map, and also the adjoining lands in the street and on the south side of it, conveyed the strip to N., designating the north side of *the street* as his southern boundary; and subsequently conveyed the rest to A., designating the same side of *the street* as his northern boundary. *Held* that, by the deed of the strip to N. the adjoining land in the street was dedicated to the public; and though A. had purchased without notice of that deed, and procured his conveyance to be first recorded, he was only entitled, on the opening of the street, to nominal damages.

*Quere*, whether the recording statute could, under any circumstances, affect a right of this nature which had previously accrued to the public.

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Matter of 'Thirty-Ninth street, New-York.

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One who has been assessed for benefit by the commissioners of estimate, &c. has a right to oppose the confirmation of their report, where it contains an erroneous allowance to others by which his burthen has been enhanced.

R. EMMETT, for the corporation of the city, moved the confirmation of the report of the commissioners of estimate and assessment.

*J. F. Lovett*, on behalf of Isaac Adriance, opposed the motion on the following state of facts. Samuel R. B. Norton, in 1834, sold and conveyed to Effingham H. Warner a piece of land which was described in the deed of conveyance as follows: "Commencing on the E. side of the 8th avenue where the S. side of 38th street intersects the same, thence E. along the S. side of 38th street 593 feet; thence N. and parallel with the 8th avenue, 287 feet 6 inches, to the centre of 39th street; thence W. along the centre of 39th street, to the 8th avenue; and thence S. along the 8th avenue, to the place of beginning." Norton still remained the owner of a narrow strip of land in 39th street, lying north of and adjoining the premises conveyed to Warner. The commissioners have allowed Norton the value of this strip of land; and Adriance, who has been assessed for benefit, insists that Norton had dedicated the land to public use, and should, therefore, have been allowed only a nominal sum for the fee taken by the corporation on opening the street.

*C. Stevens* opposed the confirmation on behalf of Daniel B. Tallmadge who had been assessed for benefit, and the persons to whom he had since conveyed. John L. Norton owned lands lying north of 39th street, and separated from the north line of the street by a narrow strip of land which belonged to Alexander O. Spencer and his wife, who owned, in addition to the strip, the land in the street and the adjoining land on the south side of the street. In 1829 Spencer and wife sold and conveyed the strip of land lying north of the street to Norton; and Norton afterwards sold lots, covering this strip and his adjoining land, bounding

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Matter of Thirty-Ninth street, New-York.

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the purchasers by the north line of the street. After the sale to Norton, Spencer and wife sold and conveyed their remaining land, amounting to over four acres, to John Jacob Astor, bounding him on the north by the north line of 39th street; and Astor's deed was recorded before the deed to Norton. The commissioners allowed Astor the value of his land lying in the street, which the objectors insist had been dedicated to the public by the deed to Norton. The objectors made an affidavit stating their *belief* that Astor's counsel had notice of the deed to Norton at the time he took his conveyance.

*R. Emmett*, for the corporation, insisted that the deed to Norton was void as against Astor, whose deed, though given last, was first recorded; and that this would defeat the prior dedication. He denied that there was sufficient evidence to charge Astor with notice of the deed to Norton.

*By the Court*, BRONSON, J. The commissioners have proceeded on a distinction, which does not amount to a difference in principle, between this case and those which have heretofore been before us. They have allowed S. R. B. Norton the value, instead of a nominal sum, for the strip of land which he still owns in 39th street, on the ground that he did not convey to Warner in parcels of the usual size for city lots, and because, as to 39th street, he bounded the purchaser by the *centre* instead of the *side* of the street. In the *Matter of 32d street*, (19 *Wendell*, 128,) I noticed the fact that the owner had laid out and sold his land in small parcels of the usual size for city lots; but I did not intend to intimate that it could be a matter of much importance on the question of dedication; whether the owner sold in small or in large parcels. It is enough that he refers to, and adopts the commissioners' map. In this case, Norton has bounded the purchaser on three sides by two of the streets and an avenue, as they were laid out and established by the commissioners under the act of 1807; and this we think a plain dedication of all his adjoining land in



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Matter of Thirty-Ninth street, New-York.

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the site of the avenue and streets to public use. We do not think it important that the purchaser was bounded by the centre, instead of the side of 39th street. In the one form as well as in the other the vendor plainly refers to the commissioners' map, and adopts the street as it had been previously laid out by public authority. He declares that, so far as he is concerned, it shall be a public street. He could have intended nothing less.

The commissioners erred in allowing Norton any thing beyond a nominal sum ; and Adriance, who has been assessed for benefit, has a right to complain of their decision. It has enhanced the burden which falls on him.

Spencer and wife, who at another place owned the lands in, and on both sides of the street, conveyed a narrow strip to J. L. Norton in 1829, bounding him by the north side of the street ; and thus dedicated the adjoining land in the site of the street to public use. But it is said that this dedication was defeated by the subsequent deed to Astor, because that deed was first recorded, and there is no sufficient proof of notice to Astor of the prior conveyance. The two deeds do not conflict with each other. There is a common boundary between the grantees in both. The land conveyed to Norton lies on the north, and that conveyed to Astor on the south, of the north line of the street. It may be doubted, whether the recording statute could have any effect upon the right which had previously accrued to the public in consequence of the deed to Norton. But I do not think it necessary to consider that question. The grant to Astor, although it includes the land in the site of the street, plainly refers to, and sanctions the commissioner's map, and thus manifests the assent of both grantor and grantee that the street, as it had been laid out under the act of 1807, should be a public street. It can make no difference in principle, that the grant to Astor did not stop at the south, but extended to the north side of the street. By making the street a boundary in any form, the parties have signified their assent to what had previously been done by public authority, and have devoted the land

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in the site of the street to public use. Mr. Astor was only entitled to a nominal sum; and those who have been assessed for benefit have a right to complain.

The report must go back to the commissioners to be revised and corrected in the two particulars which have been mentioned.

Ordered accordingly.

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THE PEOPLE, *ex rel.* Onderdonk, *vs.* THE SUPERVISORS OF QUEENS COUNTY, and others.

On motion for a common law *certiorari*, opposing affidavits may be read, notwithstanding the case of the *Commissioners, &c. v. The Judges, &c.* (9 Wend. 434,) apparently *contra*.

Until the proceedings of an inferior tribunal are removed into this court, no order to quash them can be made, however irregular they may be.

*Semble*, that persons upon whom a tax has been illegally imposed, and which is about to be collected, can obtain no relief through a *mandamus*.

An order made by a supreme court commissioner to stay the proceedings of a collector of taxes on his warrant, with a view to a motion, is a nullity, and may be disregarded without any formal *vacatur*.

It is seldom proper to award a common law *certiorari*, where the party has an adequate remedy, against the proceeding complained of, by action.

A *certiorari* will not lie to a *ministerial officer*, (e. g. a collector of taxes,) for the purpose of examining his right to proceed upon process under which he is acting. Nor will it lie to any inferior tribunal except to remove proceedings which *still remain before it*. *Semble*.

The certificate of town auditors allowing accounts, regular on its face, is a sufficient authority for the board of supervisors to proceed and cause the amount certified to be levied on the town.

*Semble*, such a certificate precludes the supervisors from enquiring as to the merits of particular items allowed; and if laid before them at their annual meeting, they are bound to act upon it without modification as to its amount.

A certificate of this nature, purporting in the body of it to have been made by "the board of auditors of the town of N. H.," is sufficient, though the officers have merely signed their names without adding their official titles.

It need not appear on the face of the certificate that the auditors met at the proper time and place; it will suffice, if in point of fact their meeting was regular in those respects.

Where all the officers constituting the board of town auditors have met, a majority of them may decide, and their certificate will be valid though the supervisor has refused to sign it.

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A *certiorari* will not lie to remove and correct the proceedings of a board of supervisors in assessing town and county taxes.

A writ of prohibition does not lie to a *ministerial officer*, (e. g. a collector of taxes.) to stay the execution of process in his hands ; but only to a *court* in which some legal proceeding is pending, and to the *party* prosecuting the proceeding.

The case of *The People v. Works*, (7 *Wendell*, 486,) commented on and explained.

H. M. WESTERN moved for a *certiorari*, *prohibition*, *mandamus*, "or some other writ, instrument, process, order or proceeding," for the relief of the relator and other taxable inhabitants of the town of North Hempstead, Queens county, from the tax which the town collector was proceeding to collect by virtue of a warrant from the board of supervisors of the county. He read an affidavit of the relator, and other papers, for the purpose of showing that the *town auditors* in October last improperly allowed the sum of \$3264,22, for the costs and expenses of several suits in relation to *Pear-sall's Landing*, as a charge against the said town of North Hempstead ; that the *board of supervisors* of the county, at their subsequent annual meeting, had directed that sum, together with the other town charges, to be levied upon the taxable inhabitants of North Hempstead ; and had issued a warrant to the *town collector*, who was now proceeding under that authority to collect the tax. The affidavit states the relator's tax at \$46,50, of which he believes the sum of \$27 is on account of the illegal charge above specified. In addition to the objection that the allowance in question was not a proper town charge, several objections were taken to the proceedings of the town auditors and the board of supervisors. It was also insisted that the warrant to the collector was irregular and void : and that the collector had forfeited his office by neglecting to execute his official bond in due time and proper form.

*H. E. Davies*, for the supervisors and others, proposed to read affidavits in answer to that on which the application was founded.

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*Western* objected that, on motion for a common law *certiorari*, opposing affidavits could not be received, and cited *The Commissioners of Warwick v. The Judges of Orange*, (9 *Wendell*, 434.)

BRONSON, J. That case, as reported, has not been followed—certainly not of late. Motions of this kind are addressed to the sound discretion of the court, and we think that discretion will be best exercised after hearing all the facts, so far as either party chooses to present them. I will hear the answering affidavits.

Affidavits were then read, for the purpose of showing that this was a proper town charge, and that all the proceedings had been regular. After the reading of the papers had been completed,

*Western*, for the relator, insisted that the proceedings complained of were so clearly irregular and void, that the court should at once make an order for quashing them, without waiting the dilatory course of a *certiorari*, or other writ. [BRONSON, J. Until the proceedings are regularly removed into this court, we have no power to quash them.] I shall then ask for a *mandamus*, or some other appropriate writ, for the relief of the relator and the other tax-payers who complain of these proceedings. [BRONSON, J. I do not see what use can be made of a writ of *mandamus* in a case like this.] I will then confine myself to the writs of *certiorari* and *prohibition*. A *certiorari* should be directed to the *town auditors*, for the purpose of setting aside their proceedings in allowing the accounts; and also to the *board of supervisors*, for the purpose of quashing their proceedings—at least, so far as relates to the illegal charges in question. But a *certiorari* alone will not answer the purpose; for before we can reach the end of our application in that way, the tax will be collected. A writ of *prohibition* should therefore be directed to the *collector*, restraining him from taking any further step in the collec-

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tion of the tax. *The People v. Works*, (7 Wendell, 486,) is an authority in point for awarding a prohibition. The counsel then examined at large the various objections to the proceedings, and cited several authorities in support of his positions.

*H. E. Davies & M. T. Reynolds* opposed the motion.

An order to stay the collector's proceedings on the warrant for collecting the tax, until this motion should be decided, had been made by Roderick R. Morrison, a supreme court commissioner for the county of Richmond. As the court did not propose to decide the main question until time had been taken to look into the papers, *Davies* asked that the order to stay proceedings might be vacated.

BRONSON, J. There is no occasion for doing that. The order was a nullity from the beginning. There was no suit or proceeding in this court, and neither the commissioner nor a judge of this court had any authority to stay the collector.

At a subsequent day, the opinion of the court was delivered by

BRONSON, J. In the view I have taken of the case, it will not be necessary to go into a particular examination of all the objections which have been urged against these proceedings. If the relator has confidence in the opinion that the warrant of the supervisors is void upon its face for any of the defects which have been pointed out, or thinks the collector has forfeited his office by omitting to execute a bond in due time, or in the proper form, he can try those questions in an action of trespass or replevin, when his property shall be seized; and it cannot often be proper to award a common law writ of *certiorari*, where the party has an adequate remedy in another form. Indeed, a *certiorari* to the town auditors, or the board of supervisors,

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would only bring up such proceedings as still remain before those bodies respectively. It would not remove the warrant in the hands of the collector, nor would the return show whether the collector had forfeited his office. And clearly we cannot send a *certiorari* to that ministerial officer for the purpose of examining the process under which he is acting, or to enquire into the title by which he holds his office. There is no precedent for such a proceeding.

In relation to the principal question, the affidavits in opposition to the motion leave little room for doubt, that should a *certiorari* be sent to the *town auditors*, the return would state the costs in question to be a proper town charge. But if they should admit the contrary to be the truth, and we should thereupon quash their proceedings, it would not overthrow the subsequent proceedings of the supervisors, in assessing the tax. That board had before it a certificate in due form, of the auditing of the town accounts of North Hempstead for the year 1840, which was a sufficient authority for what the board did, whether the accounts had in fact been properly audited or not. Indeed, the supervisors had no discretion but to direct the amount specified in the certificate to be levied and raised upon the town. (*Statute of 1840, p. 251, ch. 305.*) There can, therefore, be no use in sending a *certiorari* to the town auditors.

If the writ should be directed to the *board of supervisors*, it must still fail to accomplish the end which the relator has in view. The supervisors would return, that the sums which they directed to be levied upon the town of N. H., were duly certified to them as town charges by the proper board for settling that question; and that would be an end of the matter. The proceedings would be affirmed as a matter of course.

But it is said that the certificate of the town auditors was insufficient. The board of town auditors consists of the supervisors, town clerk, and two or more of the justices of the peace of the town. (*Statutes of 1840, p. 251, ch. 305.*) The first objection is, that the officers composing

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the board have only signed their names, without adding their official titles to the certificate. But they have done something more. The certificate purports to be made by "the board of auditors of the town of North Hempstead;" and that is, I think, sufficient. It is also objected, that it does not appear on the face of the certificate, that the auditors met at the *time* and *place* prescribed by law. It is enough that they in fact met at the proper time and place. Another objection is, that the supervisor did not sign the certificate. He met with the other officers constituting the board, and when the body was properly formed, a majority of the members could act, although the supervisor or any other member should dissent. None of the minor objections to the certificate are well taken.

If these views are correct, the awarding of the writ could be of no use to the relator. But if we assume that there is some defect in the proceedings which might be reached by a *certiorari*, I still think the writ ought not to be granted. This is an attempt to remove the proceedings of the board of supervisors in assessing the general town and county taxes upon the taxable inhabitants of North Hempstead; and the errors into which the board may have fallen cannot be corrected in this way without producing great public inconvenience. This subject was fully considered in *The People v. The Supervisors of Allegany*, (15 Wendell, 198.) We thought it not a proper exercise of discretion, to allow a *certiorari* in such a case, and, retracing our steps, we quashed the writ which had been awarded, notwithstanding the fact that a return had been made, and the cause had been argued upon its merits. We see no occasion for departing from that decision. In addition to the authorities cited on that occasion, I will mention that another case is referred to in *Mooers v. Smedley*, (6 John. Ch. R. 28,) where a *certiorari* to the supervisors was denied by this court.

The only remaining branch of this case is the motion of the relator for a writ of *prohibition* to the *town collector* to stay the levying of the tax. A writ of prohibition does

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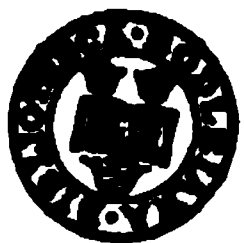
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not lie to a *ministerial officer* to stay the execution of process in his hands. It is directed to a *court* in which some action or legal proceeding is pending, and to the *party* who prosecutes the suit, and commands the one not to hold, and the other not to follow, the plea. It stays both the court and the party from proceeding with the suit. 'The writ was framed for the purpose of keeping inferior courts within the limits of their own jurisdiction, without encroaching upon other tribunals. (2 *Inst.* 601. *F. N. B.* 94. *Vin. Ab. tit. Prohibition*; and same title in *Com. Dig.*, *Bac. Ab.* 7th *Lond. ed.*, and *Tomlin's Law Dict.* 3 *Bl. Com.* 111. See also *Tomlin's Law Dict. tit. Consultation*; and *F. N. B.* 116.) Our statute also shows that the writ issues to a *court* and prosecuting *party*—not to a ministerial officer. (2 *R. S.* 587, § 61, 65.) In the *People v. Works*, (7 *Wendell*, 486,) although the motion for a prohibition *seems* to have been granted, the remarks of the chief justice are in perfect harmony with what has been said in this opinion in relation to the proper office of the writ: and that case must not be understood as having decided any thing more than that the tax then under consideration was illegal. There is not the slightest foundation in the books for saying, that a prohibition may issue to a ministerial officer to stay the execution of process in his hands.

If the relator has suffered, or is in danger of suffering an injury, he is mistaken in supposing that we can grant the relief which he asks.

Motion denied.





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Hapeman v. Woolford.

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## HAPEMAN vs. WOOLFORD.

Where it is intended to hold the defendant to bail in an action for a breach of a promise to marry, the *ac etiam* clause in the *capias ad respondendum* is sufficient if it be in the ordinary form in assumpsit, thus—"and also, &c upon promises,"—without adding any thing indicating the particular nature of the promises.

MOTION to set aside an order made by a commissioner, discharging the defendant from custody on filing common bail, and to amend the *ac etiam*.

The action was instituted for breach of marriage promise, and a commissioner's order obtained, on affidavit, to hold the defendant to bail. But the *ac etiam* was in the ordinary form in assumpsit: "and also, &c. upon promises," without adding, "to marry."

The commissioner's order to discharge was founded on this omission.

The defendant had given bail on his arrest; and the present motion was opposed by his bail.

*G. Humphreys*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. I do not see why the *ac etiam* "on promises" is not sufficient, as comprehending a promise to marry. This is one of the cases excepted by the non-imprisonment act, (1 R. S. 808, 2d ed. § 2,) and therefore stands on the old law of bail. By that, "no person shall be held to bail on a *capias ad respondendum*, unless the true cause of action be particularly expressed therein." (2 *id.* 270, § 7.) This, however, calls for no more than the old forms of *ac etiam*; and I am not aware that the one in question, which was the usual form in assumpsit, has ever been held to come short of sufficiently expressing a promise to marry. The statute might be construed as to require the whole substance of the declara-

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 Van Vechten v. Cowell.
 

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tion; but under the like statute which existed previously, the only way to give it any practicable effect was found to be, by allowing a short intimation, such as may be found in our books of practice. (*Vid.* 1 *Sell. Pr. Introd.* 35. 1 *R. L. of* 1813, 424, § 14.) Then, as now, an order was necessary to warrant the holding to bail, where the promise intended by the *ac etiam* was of marriage. The motion is granted; but without costs.

Rule accordingly.

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 VAN VECHTEN vs. COWELL.

Where, to a declaration in debt on simple contract, the defendant pleaded *non assumpsit*, and a set off against the promises mentioned in the declaration; held, that the plaintiff might treat the pleas as a nullity, and enter the defendant's default.

R. W. PECKHAM, for the defendant, moved to set aside the default and subsequent proceedings for irregularity, on the ground that the default was entered after the service of pleas.

J. Van Buren, contra, read an affidavit stating, that the declaration was in *debt* on simple contract, and that the pleas served were, 1. *non assumpsit*, and 2. a plea of set off against the promises mentioned in the declaration. He insisted that the plaintiff was right in treating the pleas as a nullity, and cited *Perry v. Fisher*, (6 *East*, 549;) *Brennan v. Egan*. (4 *Taunt.* 161.)

By the Court, BRONSON, J. The cases cited show that the plaintiff was at liberty to treat the pleas as a nullity; and as there is no affidavit of merits, the motion must be denied.

Rule accordingly.

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Cutler v. Rathbone.

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**CUTLER and others vs. RATHBONE, sheriff of Cayuga**

A writ of replevin, though returnable before "*the justices*," &c. instead of "*our justices*," and mentioning *no place* of return, is amendable.

A variance between the writ, and summons, as to the nature of the action, the writ being in the *detinet*, and the summons in the *cepit et detinet*, is immaterial.

Otherwise, as to a similar variance between the writ and declaration.

The summons is a mere notice; and is sufficient, it seems, if it fairly apprise the defendant of the action being replevin, of the name of the plaintiff and his attorney, of the court whence the writ issued, and the time and place for the defendant to appear.

A mistake in returning a writ to the wrong clerk's office, is not ground for setting aside the proceedings; the statute on this subject being merely directory.

Though the affidavit of property, &c. in replevin, may be made by a third person in behalf of the plaintiff, he must do it from the facts within his personal knowledge, independent of mere hearsay of the party or others; and when the affidavit was so drawn as to raise the inference of its having been made upon hearsay, it was held insufficient, but amendable upon terms.

In this case, the replevin bond was executed by one surety, and no other person, leaving blanks for the name of the obligee and the person from whom the property was to be replevied; and in that condition it was attested by a witness, but before the writ was executed, the blanks were filled up by authority from the surety, in the attesting witness' absence. *Held*, on motion to set aside the proceedings, that the plaintiff might have leave to amend upon terms, by filing a new bond.

MOTION to set aside a writ of replevin, the service thereof, and subsequent proceedings. The writ was made returnable before "*the justices*," &c. instead of "*our justices*," &c. and mentioned no place of return. It was in the *detinet* only; and the summons served by the coroner was in the *cepit* and *detinet*. The return itself was correct in form, but was filed in the Utica clerk's office; whereas it should have been in the clerk's office at Geneva. The affidavit was made by the attorney for the plaintiffs, and was—"That he has examined into, and is well acquainted with the facts of the case, &c.; and deponent verily believes, and has no doubt, that the plaintiffs are the owners of the property described in the writ above set forth;" [the affidavit was subjoined

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to the writ;] "and that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of the said *plaintiff* liable to execution. The reason why deponent makes this affidavit is, that the plaintiffs reside in the city of New-York, and the goods are in the county of Cayuga." The replevin bond was executed by only one person, the attorney, as surety; leaving blanks for the name of the obligee and the person from whom the goods were to be replevied. It was subscribed by an attesting witness, and the bond then sent off, and the blanks afterwards filled up by another, not in the attesting witness' presence.

*W. T. Worden*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. The mistake in the form of the writ is merely clerical, and may be corrected by amendment. (*Williams v. Rogers*, 5 *John. R.* 163, 166, 7. *Morrell v. Waggoner*, *id.* 233.) The variance between the writ and summons was but formal, and could not well mislead. It informed the defendant of the term when the writ was returnable, and that the action was replevin. The summons is but a notice; and if it apprise the defendant of the proper term when he is to appear, he of course becomes fully informed as to the nature of the action by the declaration. If, on proper inquiry, he finds this to vary from the writ, he may move to set it aside; but we have never extended the same right to a formal slip in the summons. It is enough that the defendant be not misled. The statute, (2 *R. S.* 431, § 9, 2d *ed.*) requires only a brief statement, signed, &c. containing the name of the plaintiff and his attorney, the court and the time and place of the return.

Mistaking the proper clerk's office, is not a ground for setting aside the proceedings. The statute pointing out

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the place of return is merely directory. (*Garlock v. Ontario Bank*, 1 *Wend.* 288.)

The affidavit may be made by some one in behalf of the plaintiff, (2 *R. S.* 431, § 7, *sub.* 1, 2*d ed.* ;) but he must be enabled to speak from facts, independent of the mere information of the party. Here the attorney says, he was well acquainted with the facts ; and, from such acquaintance, undertakes to say that the property belongs to his clients. Such acquaintance may have been, and I infer from the attorney's further affidavit that it was, derived from the mere statement of the clients, probably in a letter, or, at most, from some one who retained him. Such an affidavit is a mere evasion of the statute. We might as well, and even better, take the certificate of the client, without oath.

We have, however, allowed a good bond to be filed where that given at first was defective. (*Hawley v. Bates*, 19 *Wend.* 632. *Whaling v. Shales*, 20 *id.* 673.) The bond and affidavit are both required by the statute as preliminaries to warrant the service, (2 *R. S.* 431, § 7, 2*d ed.*) the one in terms equally strong with the other ; and I perceive nothing in principle which forbids our allowing an amended affidavit any more than a bond.

The bond is admitted to be defective, there being only one surety ; but this defect, like all the others in the proceedings, is shown to have been a consequence of haste and clerical mistake, the defective attestation inclusive.

The plaintiffs may therefore amend all the defects, upon payment of costs.

Rule accordingly.

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Wilson v. Abrahams.

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**WILSON vs. ABRAHAMS.**

Where jurors during the trial of a civil cause were allowed to separate, and one of them drank spirituous liquors: *held*, not a ground for setting aside the verdict, it not appearing that in so doing he violated any express direction of the court, and there being no reason to suppose that he drank to excess, or upon the invitation or at the expense of either of the parties.

The case of *Brant v. Fowler*, (7 Cowen's R. 562,) so far as it holds the mere fact of drinking spirituous liquors by a juror, during the progress of a trial, to be sufficient, *per se*, to warrant the setting aside of the verdict, cannot be supported.

Every irregularity of a juror which would subject him to censure, whether in drinking spirituous liquors, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had some influence on the final result of the cause.

Cases relating to the misconduct of jurors in *civil* and *criminal* trials, cited and reviewed.

**MISBEHAVIOR of jurors.** The trial of this cause at the Albany circuit lasted nearly two days, and when the court adjourned for rest or refreshment in the progress of the trial, the jurors were allowed to separate. During the adjournment for dinner on the second day of the trial, one of the jurors went into a tavern near the City Hall, and drank about half a gill of brandy. This was before the evidence had been closed. The jury afterwards rendered a verdict for the plaintiff for ten dollars damages, which being much less than he supposed himself entitled to recover, he now moved to set aside the verdict for the misbehavior of the juror. There was no allegation that the juror was intoxicated, or that the drinking was at the request or expense of either party, or rendered him less capable than he was before for the proper discharge of his duty.

*P. Cagger*, for the plaintiff.

*M. T. Reynolds*, contra.

*By the Court*, BRONSON, J. In civil cases, when the court adjourns for refreshment in the progress of a trial.

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Wilson v. Abrahams.

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and before the cause is finally committed to the jury, it is now the usual course to allow the jurors to separate and return to their families or boarding houses for food and rest ; and if one of them drink a glass of spirituous liquor while so absent from court, I cannot think it sufficient ground for setting aside the verdict, unless there is some reason to suppose that the juror drank to excess, or at the expense or on the invitation of one of the parties. I agree that it would be well that all men should abstain from the use of intoxicating drinks ; but until that sentiment becomes nearly or quite universal, I think it should not be imposed as a law upon a juror in those cases where he is permitted for a night or an hour to go wheresoever he pleases without being attended by an officer. To adopt the language of Parke, J. in *Everett v. Youells*, (4 Barn. & Adol. 681,) where food was secretly delivered to the foreman, after the jury had retired to consider of their verdict, "it would be a fearful thing if verdicts could be set aside on such grounds as this." We might expect to see many verdicts overturned.

This case is distinguishable from those on which the plaintiff relies. *The People v. Douglass*, (4 Cowen, 26,) was a capital case, and the jurors were only allowed to leave the court room under the charge of two sworn constables, with the direction of the court to keep together and return speedily. Contrary to their duty, two of the jurors separated from their fellows and the officers, and while so separated, ate, drank spirituous liquor, and conversed with by-standers on the subject of the trial. The jurors knew that they were disregarding the instructions of the court, and doing that which the officers could not rightfully permit to be done ; and for this misbehavior, the verdict was set aside. So, too, in *Brant v. Fowler*, (7 Cowen, 562,) the jurors were not allowed to separate, but were permitted to leave the court room, accompanied by an officer. One of the number separated from the officer and drank brandy ; and for that cause, the verdict was set aside. This case certainly goes very far ; for it appears

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Wilson v. Abraham.

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that the juror did not intend to disregard his duty. He mistook the charge of the judge, and only drank a small quantity of brandy as a remedy for disease. But still the jurors were not, as in this case, at liberty to go where they pleased; nor had they the right to take either food or drink without the permission of the court. It should also be added, that the judge had delivered his charge, and the trial, as to every thing but the verdict, was at an end, before the jurors were permitted to retire.

I may notice here, that in *The State v. Prescott*, (7 *New-Hamp. R.* 287,) the superior court of New-Hampshire did not seem prepared to follow the two decisions I have mentioned, even in a capital case. Nor were they followed in *Commonwealth v. Roby*, (12 *Pick.* 510, 516, 520,) which was also a capital case.

In *Kellogg v. Wilder*, (15 *John. R.* 455,) although the court spoke with just severity of the misconduct of the justice in permitting the parties to treat the jury, yet the judgment seems to have been reversed on the ground that "the verdict was decidedly wrong upon the evidence." In *Rose v. Smith*, (4 *Cowen*, 17,) spirituous liquor was freely circulated among the jury on the trial, although the plaintiff in error objected to it; and one of the jurors was "disguised with liquor"—in other words, he was rendered incapable by intoxication for the proper discharge of his duty. That was a plain case for reversing the judgment of the justice.

I find nothing in the earlier decisions to disturb this verdict. There is an anonymous case in *Dyer*, (37, *pl.* 45,) where the jury ate and drank after they had agreed on their verdict, but before it was delivered in court; and the jurors were fined forty pence each, but judgment was rendered upon the verdict. In another anonymous case in *Dyer*, (218, *pl.* 4,) the jury, after the charge, returned and said they were all agreed except one, and he had eaten a pear and drank a draught of ale, wherefore he would not agree. On being again sent out, they found a verdict for the plaintiff, on which judgment was rendered; but the offending



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juror, or the offenders, as the report states, were committed, and found surety afterwards for their fines; and as to the bailiff who attended the jury, *curia advisare vult*. In *The Duke of Richmond v. Wise*, (1 Vent. 124,) the jury drank wine while they were deliberating; and further, "after they had given up their privy verdict, they were treated at the tavern by the plaintiff's solicitor, before their affirmance of it in court:" and for "these misdemeanors in the jury," a motion was made to set aside the verdict which they found for the plaintiff. But the motion was denied. As to the drinking wine, the judges were all agreed, "that if the jury eat or drink *at the charge of the party* for whom they find their verdict, it disannuls their verdict; but here it doth not appear that the wine they drank was had by order of the plaintiff, or any agent for him." And as to the treating by the plaintiff between the privy and the public verdict, the court held, that it did not avoid the finding; though it would have been otherwise, "if the defendant had treated them, and they had changed their verdict." In the *King v. Burdett*, (12 Mod. 111,) it is said, that if the jury eat and drink *at the charge of the party* for whom the verdict is found, it avoids it; but if at *their own charge*, they are only fineable. This case is also reported in 2 Salk. 645, where Holt, C. J. said, that if a jury eat (and there was formerly no difference as to this question between eating and drinking,) at *their own charge*, it is fineable, *but the verdict shall stand*; otherwise, if at the charge of one of the parties, and the verdict is found for him. (1 Ld. Raym. 148, S. C.) In *Harebottle v. Placock*, (Cro. Jac. 21,) it was certified upon the *postea*, that the jurors had taken meat and drink before giving their verdict, but it did not appear at whose charge; and the court said, "that would make a great difference, for if it were at the cost of the party for whom they gave their verdict, it will make the verdict void; but if it were at their own cost, it is only fineable, and the verdict good." The same doctrine is laid down in *Coke Litt.* 227, B; *Trials per pais*, 248; 21 Vin. Ab. 448, *tit. Trial*, (G. g.)

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The case of *Brant v. Fowler* cannot, I think, be supported. The mere fact that some of the jurors, "of their own head," drink spirituous liquor in the course of a cause, if, as was admitted in that case, there "has been no mischief," cannot be a sufficient ground for setting aside the verdict. There is no authority, ancient or modern, so far as I have observed, which goes far enough to uphold such a doctrine. The case of *The People v. Douglass* must be considered as having turned upon all the grounds of irregularity which were urged against the verdict, and not on the single objection that some of the jurors drank spirituous liquor. In addition to the fact of drinking, two of the jurors, contrary to their duty, separated from their fellows, and one of them conversed with the by-standers on the subject of the trial.

It is worthy of remark, that in the two cases which have just been noticed, not a single authority, or even *dictum*, was referred to for the purpose of showing that the drinking of the jurors at their own expense, where there is no reason to suppose there has been any excess, is, in itself, a sufficient ground for disturbing the verdict. The earlier cases in this court had gone upon the principle, that notwithstanding a trifling irregularity on the part of the jury, the verdict should stand, unless there was some reason to suppose that the party moving might have suffered by the misconduct of which he complained. (*Smith v. Thompson*, 1 *Cowen*, 221. *Horton v. Horton*, 2 *id.* 589. *Ex parte Hill*, 3 *id.* 355.) This rule is in accordance with the ancient cases to which I have already referred.

When in the course of the trial, a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drank so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking

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spirituous liquor, separating from his fellows, or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result.

There is no pretence in this case, that the juror either drank to excess, or at the expense of the defendant, and we think the verdict should not be disturbed.

Motion denied.(a)

(a) A similar decision was made immediately afterward, in *Dunning v. Humphrey & Clark*. There the defendant moved to set aside the inquisition found by the jury, on a writ of inquiry of damages, upon the ground that several of the jurors summoned by the sheriff drank spirituous liquor at the bar of the tavern where they were assembled, before they retired to deliberate upon their verdict. There was no charge that any of the jurors drank to excess, or that the plaintiff knew aught of the matter.

*By the Court, BRONSON, J.* This case depends on the same principle as that of *Wilson v. Abrahams*, just decided, and the motion to set aside the inquisition must be denied.

Rule accordingly

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 CALDER vs. LANSING.

In verifying a plea under the 1st rule of May term, 1840, it is not sufficient to swear to a *defence on the merits* generally. The affidavit must point to the particular demand on which the action is brought.

But where the declaration was on an *award* pursuant to a *parol submission*; *Held*, that the case was not within the act of 1840, and therefore the plea need not be verified by affidavit.

If the action is founded either wholly or in part on a *parol agreement*, the defendant may plead without an affidavit of merits.

*It seems*, that had the submission been in *writing*, the case might have been brought within the statute and rule mentioned.

**VERIFYING pleas.** The declaration stated a *parol submission* to arbitration, and a *written award* to pay a sum of money and the costs of a suit to be taxed. The plaintiff served a copy of the award, and taxed bill of costs, with the declaration; with notice that these were the only demands to be given in evidence. The defendant served a

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plea of the general issue, with an affidavit of merits, concluding as follows: "that he has a good and substantial defence on the merits in this cause, as he is advised by his said counsel, and verily believes." The plaintiff's attorney disregarded the plea, and entered the defendant's default, on the ground that the affidavit of merits was not sufficient.

*G. R. Davis*, for the defendant, moved to set aside the default, for irregularity.

*A. F. Wheeler*, for the plaintiff.

*By the Court*, BRONSON, J. If this case comes within the first rule of May term, 1840, (22 *Wendell*, 644,) the affidavit accompanying the plea was insufficient. It was not enough to swear to a defence on the merits generally. Such affidavits have sometimes been put in merely because the declaration contained counts which were not adapted to the particular dealings between the parties, or claimed damages beyond the amount really due. When the plaintiff brings his case within the rule in question, the affidavit of merits must point to the particular demand on which the action is brought.

But no affidavit was necessary in this case. The statute speaks of "actions upon *contract* upon any *written instrument* or *record*." (*Statutes of 1840*, p. 333, § 17.) And the rule made in pursuance of this enactment, provides for "actions upon any written instrument or record" where it appears "that the written instrument or record is the *only* cause of action on which the plaintiff relies." The award in this case, though a "written instrument," is neither a *contract* nor a *record*. And besides, a *parol* submission to arbitration lies at the foundation of the action. The award is nothing without an agreement to abide by it. If the submission had been in *writing*, the plaintiff might have brought his case within the statute and rule in ques-

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tion; but where the action is founded, either wholly or in part, on a parol agreement, the defendant may plead without an affidavit of merits.

Motion granted.

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CHRYSLER vs. JAMES and others.

Where a declaration on the money counts was served, with a notice that certain notes, copies whereof were subjoined, would be given in evidence, but not restricting the plaintiff's claim to those demands; and the defendant put in a plea of the general issue without an affidavit of merits: *Held*, that the plaintiff could not afterward amend under the 23d rule, by serving a copy of the declaration in the same words as the one before delivered, with a notice that the notes, copies of which were again given, constituted the *only cause of action* relied on. Such a notice is not a *bill of particulars*, either in terms or legal effect.

*It seems*, that if a plaintiff has served a *bill of particulars* with his original declaration, he will be entitled to amend under the rule in question, by changing the form of the particulars.

For most purposes a bill of particulars is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of the pleading.

**AMENDMENTS.** The plaintiff served a declaration containing the money counts, with a notice that two promissory notes, of which copies were subjoined, would be given in evidence on the trial. As it did not appear that the notes were the *only* cause of action on which the plaintiff relied, the defendants pleaded the general issue, without accompanying the same with an affidavit of merits pursuant to the first rule of May term, 1840. (22 *Wendell*, 644.) The plaintiff thereupon amended under the 23d rule, by serving the defendants' attorney with a copy of the declaration in *the same words* as when originally delivered, with a notice that the notes, of which copies were again given, were the *only* cause of action on which the plaintiff relied. The defendants' attorney, thinking the plaintiff irregular in amending his *notice* instead of the *declaration*, omitted to plead anew, and at the end of twenty days the plaintiff entered a default, which

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*K. Miller*, for the defendants, now moved to set aside for irregularity.

*M. T. Reynolds*, for the plaintiff.

*By the Court*, BRONSON, J. If the plaintiff had served a bill of particulars with the original declaration, he would perhaps, have been authorized to amend of course under the 23d rule by simply changing the form of the particulars. Although the rule only provides for amendments of the *pleadings*, yet, for most purposes, the particulars are regarded as an amplification of the pleading to which they relate, and are construed as though they formed a part of it. (*Starkweather v. Kittle*, 17 *Wendell*, 20.) But it is not necessary to decide that question. In this case the plaintiff did not, in the first instance, serve a bill of particulars. He only gave such a notice and copy of notes as would authorize him to give the instruments in evidence under the money counts, pursuant to the act of 1832, without restricting his claim to those demands. It was not a bill of particulars, either in terms or in legal effect. His subsequent amendment was nothing more than delivering a bill for the first time; and that was not within the rule authorizing an amendment of the *declaration* as of course. The plaintiff may, no doubt, voluntarily deliver the particulars of his demand after the service of the declaration, for the purpose of avoiding the delay incident to an order for a bill obtained by the defendant. But he cannot in that way impose on the defendant the necessity of pleading anew, and verifying his plea under the first rule of May term, 1840.

Motion granted.

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Wilson v. Wetmore.

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WILSON vs. WETMORE.

A party moving to quash or supersede a writ for some defect therein, must point out the defect, either in his affidavit, or notice of motion. It is not enough that the papers on which he moves contain a copy of the writ, in which the defect appears.

P. CAGGER, for the defendant in error, moved to quash or supersede the writ of error, on the ground that the name of one of the parties was omitted in the body of the writ. He moved on an affidavit, and what purported to be a copy of the writ; but neither the affidavit nor notice of motion mentioned any defect or omission in the writ.

*M. T. Reynolds, contra.*

*By the Court, BRONSON, J.* The motion must be denied, with costs. Where a party moves on the copy of a writ or other paper, intending to rely on some formal defect or error in the proceeding, he must, either in his affidavit or notice of motion, point out the particular objection on which he intends to rely, to the end that the other party may have a fair opportunity to answer. It is quite possible that the defendant is moving on an erroneous copy of the writ, or that the plaintiff would have had some other good answer to the motion, if he had not been brought here without the slightest intimation of the objection which is now urged against the writ.

Motion denied.(a)

(a) IN ANOTHER CASE between the same counsel, a motion was made to set aside an execution, on the ground that it was tested out of term. A copy of the execution was annexed to the moving papers, but no mention was made of the error on which the party intended to rely; and the judge, for that reason, denied the motion with costs.

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ANON.

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ANON.

Service of papers through the post office, under rule 4th, of May term, 1840, is ineffectual, unless the entire postage legally chargeable thereon be paid. So held, where the person mailing them paid as for a *double* letter, that being all the postmaster demanded, though *treble* postage was the legal charge; and the postmaster at the office to which the letter was directed, corrected the charge, and demanded the balance, in consequence of which the attorney for whom they were intended refused to take them out.

If the papers are properly mailed, the attorney to whom they are sent takes the risk of all accidents.

It is not enough, however, that the *papers* are directed to the attorney; they must be *enclosed in a wrapper, &c.*

SERVICE of papers by mail. The papers were deposited in the post office, and postage paid as for a *double* letter, which was all that the postmaster demanded; though *treble* postage should have been paid. The postmaster at the office to which the letter was directed marked it *undercharged*, and demanded the balance of postage from the attorney to whom it was directed; in consequence of which the attorney refused to take it out of the office, and a default was entered. On a motion to set aside the default, the question was, whether the service was good under the 4th rule of May term, 1840. (22 *Wendell*, 644.)

*By the Court*, BRONSON, J. The service was insufficient. The letter failed to reach the attorney to whom it was directed, in consequence of the omission to pay all the postage legally chargeable upon it. When the papers are properly mailed, the attorney to whom they are sent takes all the risk of accidents. We ought not to subject him to any further burden. He is not obliged to take the papers from the office charged with postage. The attorney who sends the papers must pay all the postage that can be legally demanded, or take the hazard of their not being received in consequence of his omission.



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IN ANOTHER CASE, the papers were directed to the attorney but were not *enclosed in a wrapper*, as the rule requires, in consequence of which they were received in a soiled and damaged condition.

*By the Court*, BRONSON, J. The service was not sufficient. The rule must be strictly complied with.

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MASON vs. W. KNOWLSON.

W. KNOWLSON vs. MASON.

A party, to have the right of setting off one judgment against another, on motion, must be the absolute owner of the former in his own right; especially as against persons to whom the defendant therein has assigned the other judgment.

M., being indebted to K., procured from T. a negotiable note against K.; afterward K. assigned the demand against M., who, on being informed of the assignment, proposed to the assignees to set off the one demand against the other, which the latter refused. Then M. sued the note, and before he obtained a verdict, the assignees sued him in K.'s name, on their demand. The latter suit was tried before M. perfected his judgment; but M., though he continually urged the assignees to a voluntary allowance of his set-off, did not attempt to enforce it in their suit; and judgments were finally rendered on both demands. Some facts appeared, tending (though obscurely,) to show, that M. was a nominal holder of the note for T.'s benefit; and the affidavits of M. and T. did not deny this, except by stating, in general terms, that the note was transferred *bona fide* and absolutely, for a good and valuable consideration, &c. Held, that under these circumstances, the inference of M. not being the holder of the judgment upon the note in his own right, was too strong, to warrant the court either in ordering a set off of the judgments, or a feigned issue to try the question of fact.

Had M. endeavored to get the note allowed as a set off, in the suit against him, and been defeated, it seems a feigned issue might have been awarded.

set off of a judgment, upon motion, will not be refused, merely because the party has neglected an opportunity to set off the subject of the judgment, or the judgment itself, on a trial. *Semble*.

set off of a debt due from an assignor, will not be allowed, as against his assignee, unless the defendant acquired it *bona fide*, before notice of the assignment.

MOTION on the part of Mason, to set off judgment  
 he affidavits on the side of Mason, made out the follow

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ing case. Mason, on the 15th June, 1838, purchased a promissory note against W. Knowlson, payable to A. Thomas or bearer, and commenced his suit upon it Nov. 1st, of the same year. The cause was tried in April, 1839, on a plea of the general issue, and notice of a set off against Thomas; and a verdict was rendered for Mason, the plaintiff, of \$956,97. Judgment thereon was entered May 6th, 1839, for damages and costs, \$1017,46.

On the 1st of March, 1839, W. Knowlson commenced a suit against Mason, for a cross demand, which he might have set off in the first action. Previous to this, Mason had offered W. Knowlson to set off their mutual claims, and pay the balance due, which the latter refused to do, declaring he had assigned his demand to Samuel Lightbody and Richard Knowlson. Mason then repeated the offer to S. Lightbody and R. Knowlson, and their attorneys, which was again refused. It was again repeated to the attorneys, after they had commenced the cross-suit, and again declined. Mason then interposed a plea of the general issue, and tender of the balance, offering again to pay, which was declined. The cause was noticed for trial at the April circuit, 1840, when it was referred. The parties agreed on a balance for the referees to report, and Mason again repeated his offer, which was again declined; and judgment was perfected against him in the name of W. Knowlson, as plaintiff, for \$1398, Jan. 28th, 1841. It was not denied by Mason, that he had full notice of the claim by Lightbody and R. Knowlson, to be assignees, in season to have interposed his claim, and litigated his right of set off in the suit brought by them, in the name of W. Knowlson.

By affidavits on the part of W. Knowlson, (this motion being resisted in behalf of his assignees, Lightbody and Richard Knowlson,) it appeared that the claim in favor of W. Knowlson had been absolutely assigned to them, July 3d, 1838, for a valuable consideration; after which Mason had offered to set off the note he had before obtained of Thomas. The affidavits also tended to show, though

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not very clearly, that Mason had obtained the note of Thomas on condition that he might look to Thomas for reimbursement of what he had paid for it, if he did not succeed in setting off the note against Knowlson. The terms of the affidavits on Mason's side, respecting the manner in which he obtained the note, sufficiently appear in the opinion of the court.

*E. A. Graham & S. Beardsley*, for the motion.

*C. A. Mann*, contra.

*By the Court*, COWEN, J. Clearly, the regular course for Mason was to have set off the note he obtained of Thomas against the cross-suit of Knowlson. This he might have done, notwithstanding his own action; and then his right to set off would have been tried in the proper place, by a jury, or by the referees. The verdict he obtained operated but as a liquidation of the amount; and would have been evidence under a plea or notice proposing to set off the note. (*Baskerville v. Brown*, 2 Burr. 1229.) The whole case might then have been heard through witnesses on the stand. If the assignees of Knowlson had discontinued or refused to proceed to a trial or hearing, still the right to set off in some form, if there existed any originally, might have been kept unimpaired. It was impossible for the assignees to avoid being met with it on bringing their claim to a trial, had Mason insisted upon it. Instead of doing so, knowing that W. Knowlson disclaimed all interest in it, that the suit was by the assignees, as the real parties, that they repudiated the proposition to set off, and insisted on direct payment of the whole, (thus intimating a desire to try whether the note was really his, or interposed merely for the benefit of Thomas,) he perfected his own judgment, leaving the assignees to do the same thing with theirs. I will not say this is an estoppel; but it certainly shows very little hope of being able to make out a set off by such evidence as would have been competent upon a trial. I find

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it entirely settled, that if this demand of Thomas was holder by Mason, to be set off for the benefit of Thomas, by arrangement between them, the latter must be regarded as the real owner; and the demand could not have been, nor can it now be set off; at least, not as against Wm. Knowlson's assignees. (*Fair v. M'Iver*, 16 *East*, 130. *Satterlee v. Ten Eyck*, 7 *Cowen*, 480. 2 *R. S.* 278, 2d ed., § 32, sub. 7, 8.)<sup>(a)</sup> There seems to have been a constant struggle, from the time when Mason obtained the note, to induce a voluntary set off by W. Knowlson and his assignees. Mason looked upon a set off as his only mode of obtaining payment; yet he submits to a report against him, knowing that W. Knowlson's assignees were the real parties to the suit, claiming in defiance of the set off. Such a circumstance leads the mind very strongly to infer a collusive arrangement; and would seem to call for, at least, a very clear case, to overcome the inference. But without showing any satisfactory reason why he omitted to try his right, at the proper time, Mason comes on his own affidavit, stating generally, that he *was the owner of the note*, from the 15th of June, 1838, Thomas swearing that he then *bona fide and absolutely transferred it, for a good and valuable consideration*. Neither of them specifically deny, that it was taken to be set off for Thomas; neither state what the consideration was, in kind or amount; nor whether any was paid; nor if any, whether, on failure to set off, Thomas was to refund. On the contrary, there is evidence of Mason's declarations, tending to show that he had become a nominal holder, for the benefit of Thomas. As the case stands, neither would have been competent witnesses; but I doubt whether the claim would have availed against a cross-examination of Thomas before a jury, even on his being released, and made technically admissible; though I am inclined to think I should have awarded an issue, had not the plaintiff passed by the forum where alone any thing like a satisfactory examination of Thomas or other wit-

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<sup>(a)</sup> See *Barbour's Law of Set Off*, 37, 8.

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nesses could be had. As the case stands, on the evidence, I think it too strong against Mason to warrant my interposing at all.

I put the case on the evidence. I do not mean to say, that we will not set off a judgment on motion, merely because the subject of the judgment, or the judgment itself, might have been set off on a trial, though there are *dicta* in *Philipson v. Caldwell*, (6 Taunt. 176,) which look that way. It is always right that compensation should be made by a set off; and where there is no previous dispute that the claims are in right of the parties, or no notice of any such dispute, the set off may as well be made on motion, as in any other way; and the books on set off say it may. (*Montagu on Set Off*, 10. *Babingt. on Set Off*, 104.) But the 2 R. S. 278, 2d ed., § 32, sub. 7, 8, as well as decisions in this court before the statute, recognize an assignment, and take away all right to set off a debt of the assignor against the assignee, unless the defendant acquired it *bona fide*, before notice of the assignment. If he did, he may then set off by notice or plea. The assignee becomes a real party, known as such to the law; and Mason, in the present instance, having notice of the assignment, and that his right of set off was denied, wilfully refusing to try the question in the proper place, but going on himself to judgment, and then coming here on affidavits unsatisfactory in themselves, and made still weaker by opposing proofs, presents a case, on which I think it safe to say, he is not entitled to relief, or any farther opportunity to try his right.

Motion denied.

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OGDENSBURGH BANK vs. TIFT.

A motion for judgment as in case of nonsuit was denied, but without costs, where the defendant had prevented a trial by entering a *ne recipiatur* which the circuit judge refused to vacate; the plaintiff's attorney now swearing that he was unaware of the rule requiring the circuit roll to be filed the first day of the circuit, and it not appearing that any of the defendant's witnesses had left court before the cause was reached.

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*It seems, that if the excuse now offered for not filing the circuit roll had been made to appear on the motion for vacatur before the circuit judge, the present motion would have been denied with costs.*

*Quære, whether the practice of entering a ne recipiatur is not abolished, as to cases within the act of 1840 dispensing with both circuit roll and postea*

MOTION for judgment as in case of nonsuit, for not proceeding to trial at the last St. Lawrence circuit. The cause was duly noticed for Tuesday, the first day of the circuit, and placed upon the calendar by the plaintiff's attorney, who omitted to file the circuit roll till Thursday, when the cause was called for trial. He was not aware that the practice required the circuit roll to be filed the first day. Just before the cause was called, the defendant's attorney served the plaintiff's attorney with notice that a rule for a *ne recipiatur* had been entered, as it in fact had been on the day before (Wednesday). The plaintiff's counsel moved to vacate the rule, which was denied, because it had been regularly entered. The plaintiff's attorney now made affidavit, that the defendant was present and attended the court with several persons, whom deponent understood to be his witnesses; and that when the cause was called and the objection made to bring it on by reason of the rule for a *ne recipiatur*, the said witnesses were present, and the deponent verily believed that no witness attending on the part of the defendant had departed the court at the time of calling said cause. No affidavit was made in behalf of the defendant showing that any one of his witnesses had departed.

*J. A. Spencer, for the motion.*

*B. Perkins, contra.*

*By the Court, COWEN, J.* It is supposed by the counsel for the plaintiffs, that since the *nisi prius record* has been dispensed with by 2 R. S. 331, 2d ed., § 5, 6, which substitutes a circuit roll, the *ne recipiatur* for omitting to file

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the latter is no longer applicable. But all the statute does is to alter the form. The reason for filing the roll on the first day is not changed. Whether the practice in question may be affected by the present statute dispensing with both roll and postea, (*Sess. Laws*, 1840, 334, § 21,) it is not necessary to say.

The particular time, however, at which the pleadings, in whatever form, are to be furnished for use at the circuit, has long ceased to be a matter of much moment. Each party obtains a copy of them in the course of the cause before the circuit comes, and these are a sufficient guide to an understanding of the issue. This court, therefore, without denying the right to a *ne recipiatur*, (*Sage v. Robbins*, 8 Cowen, 110,) yet where an excuse was presented by the plaintiff, such as would have warranted the circuit judge in ordering a *vacatur*, refused to allow the defendant any farther advantage than he derived from putting off the cause at the circuit. (*Thompson ads. Jackson, ex dem. Thompson*, 1 Wendell, 76.) There, a motion for judgment as in case of nonsuit, was denied; and Sutherland, J., intimated that in future they would compel defendants, in like cases, to pay the costs of such motions. No doubt, in nearly all cases, every substantial object is answered by handing a copy of the pleadings to the clerk when the cause is called on for trial. The excuse now offered might have been sufficient to warrant the circuit judge in vacating the rule; but *non constat* that it was presented to him, or even mentioned to the defendant's counsel at the circuit; and it may, therefore, be too severe to charge the defendant with costs. Let them abide the event.

Motion denied.

## Brown v. Treat.

## BROWN vs. TREAT &amp; CARTER.

Where the first two counts of a declaration were in *assumpsit*, the third in *case*, charging negligence of the defendants as warehouse-men in not safely keeping, &c. goods, and the fourth in *trover* for the goods; and the plaintiff, having obtained a general verdict of guilty upon proof of the defendants' negligence as alleged, entered up judgment, and issued a *ca. sa.*, on which one of the defendants was arrested; *Held*, that the imprisonment was unlawful, and the defendant arrested entitled to be discharged.

*Semle*, that the non-imprisonment act prohibits an arrest, &c. in all suits founded in a credit given by the plaintiff to the defendant, except such as are mentioned in the second section; and that the form of the remedy chosen by the plaintiff, as whether *case*, *trover*, or otherwise, will not be allowed to affect the defendant's rights in this respect.

MOTION to discharge the defendant Treat, from arrest on a *ca. sa.*, issued on a judgment obtained in this cause.

The two first counts of the declaration were in *assumpsit*, and the third in *case*, for negligence of the defendants as warehouse-men, in not safely keeping and delivering to the plaintiff certain goods and chattels. The fourth count was in *trover*, for the same goods. Plea, *not guilty*. A verdict was rendered for the plaintiff, on proof of the delivery of the goods to them as warehouse-men, and their negligence as such. The verdict was general, of guilty, on all the counts. This was followed by a judgment, and *ca. sa.*, on which the defendant was arrested.

A. Taber, for the motion.

M. T. Reynolds, contra.

*By the Court*, COWEN, J. The two first counts set out a contract, and the two last were in fact founded on the contract implied by law between bailor and bailee. It is true that the bailor who sues his bailee for not fulfilling such implied contract, may, in form, overlook it, and at his election resort to *case* or *trover* according to the nature of his injury. Yet I hardly think the mere form of the action



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should be allowed to govern the right of imprisonment. The statute, (1 *R. S.* 807, 2d ed., § 1,) forbids imprisonment by execution in a suit to recover "damages for the non-performance of any contract." The defendant, Treat, has been imprisoned in a case clearly within these words. It seems to me that the statute was intended to reach all those cases wherein the plaintiff may in fact have given credit to the defendant, except such as are mentioned in the second section. He cannot by electing to sue in case or trover, change the truth; and it is in this that the privilege of the defendant consists. The law will not allow that to be done indirectly, which it forbids to be done directly. Bailment to an infant, presents a similar instance. The action being directly for his negligence, will not oust him of his defence, though calling for a plea of not guilty. It may be different in both cases where the gist of the action is tort, and the plaintiff elects to bring assumpsit. The answer may then be, "you have a right to elect against yourself, though not against me."

The motion must be granted, with costs, on the defendant (Treat) stipulating not to bring an action for false imprisonment.

**Rule accordingly.**

# CASES

ARGUED AND DETERMINED

IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW-YORK,

IN MAY TERM, 1841.

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## SIZER vs. MILLER and others.

A , having a large debt against one who had assigned his estate in trust for creditors, applied to the assignees for a loan of \$12,000 from the trust fund, until a dividend should be made; whereupon the latter let him have notes belonging to the estate, which, estimating them at their nominal value, amounted to \$8254,69, besides cash to the amount of \$3745,31, and took therefor M.'s note for \$12,000 with interest. *Held*, that though there was evidence tending to show the notes which M. received to have been worth at the time considerably less than he allowed for them, the transaction was not necessarily usurious, but depended upon the intent with which the loan was made.

*Held* further, that a report of referees stating that they had examined the evidence, and were of opinion *as matter of law* that the transaction was usurious, implied that they had not passed upon the question as one of intent, and was therefore erroneous.

*Cowen, J.* dissented, holding that the report did not necessarily imply this, but was equivocal; and there being evidence from which it might be sustained as a general report in favor of the defendants, the court ought not to interfere.

*semble*, it is not admissible, in such cases, by way of rebutting the usurious

## CASES IN THE SUPREME COURT.

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intent, to enquire of the party who made the loan *whether there was any intention, shift or device, on his part, to get more than seven per cent, &c;* for that is calling on him to pronounce broadly upon the very point in dispute.  
*Per COWEN, J.*

MOTION to set aside the report of referees. The action was assumpsit on a note dated February 10th, 1837, made by the defendant James Miller and his sureties, whereby they jointly and severally promised to pay to the order of Hiram Pratt, Lewis F. Allen and Joseph Clary, assignees of B. Rathbun, the sum of \$12,000, at the Bank of Buffalo, twelve months after date. The note was duly endorsed to the plaintiff. The defence interposed was that the note was usurious and void. After issue joined, the cause was referred to referees; and on the hearing before the latter, the case was as follows:

Rathbun became insolvent, and appointed the payees in the note his assignees, who subsequently sold his property and took a large amount of security in notes for the purchase money, and collected some cash. On the 4th of February, 1837, the defendant Miller, being one of Rathbun's creditors, addressed a letter to the assignees, stating, that it would be inconvenient for him to lay out of the use of what was due him till the estate was settled, and believing them anxious to do all in their power to relieve the creditors, he was induced to ask them to *loan him* a small portion of the funds belonging to the estate, until they should be needed for distribution, on his giving satisfactory security to refund the whole, or such part as he might have over and above his dividend of the estate. He specified his claim against Rathbun at \$36,000, and the amount he wished to loan at \$12,000; adding, that he asked the favor under a consciousness that the creditors were entitled to the use of the fund in preference to others.

Clary, one of the assignees, testified on the part of the defendants, that when the letter was received, the assignees had not the amount of money requested, and that he so informed Miller; but offered him cash and notes on hand, if Miller would give good security; that the cash offered by the assignees was between three and four thousand dollars.

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Witness made a list of the notes and gave it to Milier. There were upwards of thirty of them in all, ranging in amount from less than \$40 to \$800. Most of them were on interest; and the whole, including interest, amounted to \$8254,69, which, together with the cash offered, (\$3745,31,) amounted to \$12,000. Miller accepted the offer, and procured and gave the note in question for the loan. Clary further stated, that the estate alone was interested in the transaction, and that the business was conducted without reference to his own interest. He supposed the notes collectable. Many of them were due. He was of opinion that they would not have sold in market for their face. He made the advance because Miller was a large creditor, and witness would not have done it had such not been the fact. He and Miller both supposed the funds would be realized from the notes, sooner than from the dividends of the estate. He turned out exactly \$12,000, because that was the sum Miller wanted. The notes consisted of such as had been taken by the assignees on selling the effects of the estate, but they had somewhat depreciated in value. The witness denied that he made the taking of the notes a condition of Miller's having the money.

In the course of Clary's cross-examination by the plaintiff's counsel, the latter asked the witness *if there was any intention, shift or device on his part in the transaction, to get or realize more than seven per cent. from Miller.* The question was objected to by the defendant's counsel, and the objection sustained.

Further evidence was given tending to show, that the notes were worth considerable less than their face, at the time of the loan; some of them being in fact quite doubtful of collection.

A majority of the referees reported that there was nothing due the plaintiffs; and being called on for a special report, after setting forth the proceedings, they added—"Whereupon the undersigned having considered the foregoing testimony, &c. were of opinion, as matter of law, that the said note was void for usury, and thereupon reported that there was nothing due the plaintiff."

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The plaintiff's counsel now moved to set aside the report.

*S. Beardsley*, for the plaintiff.

*S. Stevens*, for the defendants.

PER CURIAM. The case states the special grounds on which the two referees proceeded who agreed in making the report. They have not found any *intention* in the trustees of Rathbun to take usury, or that there was any *shift* or *device* to evade the statute. Indeed, they have not drawn any conclusion of *fact* from the evidence, but say they are of opinion, "*as matter of law*, that the note was void for usury." In this we think they erred. The evidence does not necessarily and as a matter of law make out the fact of usury, and there must consequently be a rehearing.

COWEN, J. dissenting. If the advance to Miller is to be regarded as a loan, I apprehend we cannot disturb the report, unless the referees erred in rejecting the question put to Clary. There was sufficient evidence to warrant them in finding considerable disparity between the value of the advance and the amount at which it was estimated. That being so, they were authorized to take another step, and pronounce the transaction a device to cover usury. And though we might even differ from them, that furnishes no argument for setting aside their report. They occupied the place of a jury, and had to deal with a body of evidence upon which it was their peculiar province to form their own conclusions.

Considerable stress was, in the course of the argument, laid upon the manner in which they have expressed themselves in stating their conclusion, viz. "A majority, &c. were of opinion, *as matter of law*, that the said note was void for usury." This is supposed to negate, by implication, that they thought that there was any device, and to

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indicate that they found the usury as the necessary result of the transaction. Were that so to be understood, it might form an argument for directing them to reconsider the matter. But it appears to me that the form of expression relied on, furnishes by no means a safe ground of judgment. The expression is equivocal. It may as well mean, matter of law arising on the fact of the device, which, on the whole case, they believed had been resorted to, as the more obvious features of the transaction. If they intended the one or the other, it was easy to say so; but leaving that doubtful, the safer course is to look at the report in an aspect which cannot be mistaken, viz. as a general report for the defendants, and inquire, whether the referees, sitting as a jury, were authorized, on the whole case, to find that the note was infected with usury.

The main effort of the plaintiff's counsel on the argument was addressed to the point, that, to call the advance to Miller, as both he and Clary did, a *loan*, was to be guilty of a misnomer; that the *loan* proposed was declined; and, at least so far as the notes advanced were concerned, the whole was a mere exchange of credit. Had the advance consisted wholly of the notes, which were, no doubt, considered good at the auction, the case would furnish a better reason for adopting the view suggested. The transaction would have been literally an exchange of credits; and though at an obvious loss on the side of Miller, it was open to the explanation that he held a large debt against Rathbun's estate, expecting no more than a partial and remote payment. The purchase of the notes, therefore, and paying a larger sum than they were worth, was, in effect, but throwing off something more of a bad debt than he would lose by awaiting the dividend. Yet, even in such case, the transaction beginning by an express proposition for a loan, it is too much to deny, that the substitution of depreciated notes might not very well be pronounced, by triors of the fact, one of those numerous disguises by which lenders seek to obtain with impunity more than seven per cent. for their money. The request was, in

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question of fact for the referee; and the report should not be set aside as being against the weight of evidence in this respect.

The other question is, whether the plaintiffs were joint owners of the wheat. There is no doubt that Edward Putnam might sell to the other two Putnams any share of the interest he held, which he might think proper; and there was sufficient evidence that he did sell to them such an interest as made them tenants in common with himself in the wheat in question. Edward Putnam and Melendy were the occupiers. They arranged that Edward Putnam should take two-thirds of the products to be divided; and, by the sub-contract, Edward let in the two younger Putnams to two-thirds of his share. The agreement was, that they were to work so and so, and "each have and be entitled to one third of his, said Edward's, share," &c. There is evidence on which the referee might say there was a full performance by all the contractors and sub-contractors. Every thing seems, as between them, to have gone on harmoniously.

It is said, that Edward Putnam had no right to let in two additional partners, without the consent of all four of the original contractors. That is true, if they were partners. One partner cannot receive another into the firm without the consent of all. (*Kingman v. Spurr*, 7 Pick. 235, 237, 8. *Murray v. Kneeland*, 14 John. Rep. 318, 322.) Independently of Collins and Farnam's (the owners) consent, the two sub-contractors, S. S. and H. L. Putnam, would have become partners, only as between themselves, and Edward Putnam. (*Ex parte Barrow, in the matter of Slyth*, 2 Rose's Cas. Bankruptcy, 252, 4, 5. *Colly. on Partn.* 3, Am. ed. of 1839.) But there was evidence from which the referee might infer the assent of the other contractors. No doubt all must have known of the sub-contract, and all have chosen finally to adopt it, by joining in this action for the price of the wheat. (*Vid. Maule v. Duke of Beaufort*, 1 Russ. Ch. Rep. 349; and 7 Pick. 238, 9.)

So far, I have assumed that the original contract, under

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which the farm was to be worked, created a partnership between the parties; but it did not. It looked merely to the ownership of the products, and not to a sale. We shall see in the sequel that the parties concerned were all tenants in common of these products; but, in effect, it was certainly not more than a joint purchase. Had there been a provision for a joint sale, or joint commercial dealing in the products of the farm, or in carrying it on, it might have been different. (*Colly. ut supra*, 23, 303.) But there was not. Even a joint purchase of personal property does not make a partnership. (*Colly. on Partn.* 8 a, 10, 11, 12, ed. of 1839.) Such a purchase is said to create only a tenancy in common. (*Jackson v. Robinson*, 3 *Mason*, 138, 141.) But this is even less. It was, in effect, that one side should occupy the farm, and divide the crops, taking their share as a compensation for their labor. An agreement by two, to perform a job of work, the compensation money to be equally divided, does not make a partnership. (*Colly. ut supra*, 12.) Here was to be a division of the gross earnings of the farm; and in such a case, even had the arrangement been to sell the crops in common, and divide the money, this would not have been, within the law of partnership, a sharing of profit and loss. A., owning a saw-mill, agreed with B. to work it and divide the gross earnings equally. Held, not partners. (*Ambler v. Bradley*, 6 *Verm. Rep.* 119.) Phelps, J. said, "They never shared in profit and loss. The share which the occupier received, was a mere compensation for his labor. This point has been often determined." (*Bowman v. Bailey*, 10 *Verm. Rep.* 170, *S. P.* *Vid. also Rich v. Penfield*, 1 *Wend.* 380, 4, 5; and *Loomis v. Marshall*, 12 *Conn. R.* 69.)

A sale by joint tenants or tenants in common may be made before severance of the property, by all actually joining in the sale, or it may be made by one for the benefit of all, and, in the latter case, the sale being recognized and adopted by the others, becomes an original sale by all. (*Per Duggett, J. in Oviatt v. Sage*, 7 *Conn. R.* 99.) The consideration may then be said to move from all jointly,



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whether tenants in common or joint tenants. (*Ham. on Parties to Actions*, p. 18, Lond. ed. of 1817. *Vaux v. Draper*, Sty. 156, 157, 203. *Bell v. Chaplain*, Hardr. 321. *Bowman v. Bailey*, 10 Verm. Rep. 170, 172.) If the defendant had taken the wheat tortiously, the owners, though but tenants in common, must all have joined in trover, or they might, according to the well known right of election in such cases, all have brought assumpsit for goods sold and delivered.<sup>(a)</sup> *A fortiori* may they do this, though the property have, in fact, been sold by one only.

(a) There is considerable difficulty in determining under what circumstances this right of electing between *tort* and *assumpsit* arises. Several English writers have stated the result of the decisions quite generally, thus—"In many cases the law will raise a promise even from the *wrongful* acts of a party, and the plaintiff may waive the tort, and sue in *assumpsit*." (1 *Leigh's N. P.* 4, 5.) "There are instances in which the law raises a promise from the acts of a party, and will not admit of evidence of his intention to commit a tort, in disavowal of such tacit promise." (*Chitty on Contr.* 6.) Mr. Phillipps has been rather more explicit. He says—"In some cases where goods have been wrongfully taken, the plaintiff may waive the tort and sue upon an implied contract as for goods sold and delivered." He afterwards adds—"It is not to be understood that an action of trover can be converted into an action for goods sold and delivered, at the option of the plaintiff; the rule seems to be principally applicable to cases *where the plaintiff has been induced by a fraud on the part of the defendant, to make a contract with the nominal party, of which the defendant has derived the whole benefit.* (1 *Phil. Ev.* 110, 111, 7th ed. See also 2 *Stark. Ev.* 875, 6th Am. ed.) The main body of the decisions in England, on this head, will be found referred to by the books above quoted.

In Massachusetts, the right has been very much qualified. In *Jones v. Hoare*, (5 *Pick.* 285,) the plaintiff claimed to recover, as for goods sold and delivered, upon proof that the defendant had tortiously entered upon the plaintiff's land, and cut and carried away a quantity of timber therefrom; and the court held, that assumpsit was not maintainable. "There is no contract," they said, "between the parties, express or implied, and therefore an action *ex contractu* will not lie:" and it was added—"The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him, or detained, unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for *money had and received* for the proceeds. No case can be shewn, where assumpsit as for *goods sold* lay in such case, except it be *against the executor of the wrongdoer*, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining." The opinion of Strong, J. in the common pleas, (*id.* p. 285 *et seq.*) which the court appear to have adopted

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We have, so far, assumed that all the plaintiffs were common owners of the wheat. I have shown that Selam S., and H. S. Putnam, were properly considered, at least, common owners with Edward Putnam and Melendy. It is equally clear that all were also common owners with Farnam and Collins, provided the original contract was, in legal effect, a mere letting on shares. If a technical lease, they were not; and I do not see any evidence, independent of the

as the basis of their own, professes to review the English cases relied on as supporting the above conclusion, and notices various others, which in their *dicta* at least, seem *contra*. Further, as to the general doctrine in that state, with its qualifications, see *Whitwell v. Vincent*, (4 *Pick.* 449;) *Miller v. Miller*, (7 *id.* 133;) *Bigelow v. Jones*, (10 *id.* 161, 165;) *Gilman v. Wilbur*, (12 *id.* 120.)

In Pennsylvania also, the rule has been laid down with similar restrictions. Thus, where the plaintiff sued in *assumpsit* for a gun and horse, and he proved simply that the property was in the defendant's possession, who detained it illegally under a pretended claim of title; held, that the action should have been *trover*. The plaintiff contended that he might waive the tort, and bring *assumpsit*. But the court said, "this can only be done *when the tort-feasor has sold the article, and received the money*. In such a case, an action for *money had and received* may be sustained." (*Willet v. Willet*, 3 *Watts' R.* 277.)

On the other hand, the superior court of New-Hampshire have repudiated this distinction. Accordingly, one having taken another's goods without licence, held, that the latter might waive the tort, and sue in *assumpsit as for goods sold and delivered*; and this, though the case was determined on an agreed statement of facts, in which the plaintiff conceded that there was *no contract*—the court construing the concession as meaning simply, that there was no *express contract*. (*Hill v. Davis*, 3 *N. Hamp. R.* 384. And see *Chauncy v. Yeaton*, 1 *id.* 151.)

In Maryland, the plaintiffs, as administrators, claimed to recover in *assumpsit* against one Joseph N. Stockett, for the work and labor of certain negroes, tortiously taken and held by him for a time, and then returned. The court allowed them to recover, on the ground, that they had a right to waive the tort. And Earle, J. delivering the opinion of the court, said, "This right to waive the direct injury and adopt *assumpsit*, is universal, where the chattel taken has been turned into money. And it has been sustained in some instances, where the chattel has not been parted from by the trespasser. For the distinctions on this subject, *vid. Hambly v. Trott*, (1 *Cowp.* 375) The present case, however, differs in its facts from most of the cases decided on this head. The negroes have been restored, &c. and the claim is for damages for the tort, committed by the trespasser in seizing them, and detaining them from the owner. That this kind of tort may also be waived, and an action sub-

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emblems. And had the rent consisted in any certain amount of grain and wool, in bushels or pounds, without saying from the farm, the owners could have claimed no property in either till delivery, or at least till a tender made. The occupiers might have maintained ejectment, even against the owners, during the term, and put them to their action of covenant as a remedy for their rent.

But it is insisted that, inasmuch as the shares of the owners in the farm products were uncertain in amount, this made the parties tenants in common, at least in the productions thus to be grown and shared between them. That has been long and repeatedly held in respect to a letting on shares for a single crop. (*Hare v. Celey*, Cro. Eliz. 143. *Spencer, J. in Foote v. Colvin*, 3 John. 216, 221. *Bradish v. Schenck*, 8 id. 151. *De Mott v. Hagerman*, 8 Cowen, 220. *Bishop v. Doty*, 1 Verm. Rep. 37, and vide *Chandler v. Thurston*, 10 Pick. 205.) So for a single year, the share of the several crops to be measured and rendered by the occupier, on the premises. (*Caswell v. Districh*, 15 Wendell, 379.) In some of these cases, it was said there were not any such clear words of demise but that it was left open to pronounce the agreement general, to work on shares. It is obvious that the contract for the occupier to divide and render the owner's share by measure on the premises, was meant for no more than what the law would require to be done in some form, at least what is commonly done, by way of severing the interest of common owners in personal property. The contract between the parties was therefore not allowed to operate as a lease, the court saying, in some of the cases, that where the question is open, the construction more beneficial for both parties is, that they meant to hold in common. (See per *Spencer, J. in Foote v. Colvin*, 3 John. Rep. 216, 221, and especially per *Nelson, J. in Caswell v. Districh*, before cited.)

The sub-contract, mentioned in the report of the referee, between the Putnams, would come clearly within these cases, and, as we have seen, make them tenants in common with the occupiers; for, though the first contract contain

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ed a provision that it might continue for more than one year, and the sub-contract was the same, yet the provision was but in the nature of a re-letting for the crop of the second year. Beside, although the cases seem to suppose, that in order to save the rights of the parties as tenants in common, the letting should be for only a single crop, or, which is about the same thing in this country, a single year, it is difficult to perceive why the same form of contract for two or more years, would not continue the relation of tenants in common for the whole time. In *Rich v. Penfield*, (1 *Wendell*, 380, 384, 385,) the parties, owner and occupier, continued the working of a mill on shares for several years, and Sutherland, J. said he inclined to consider them tenants in common.

But to show that the relation of the parties to the original contract was that of lessors and lessees, and the covenant to deliver the grain was but an agreement to render a share by way of rent, we are referred to the case of *Stewart v. Dougherty*, (9 *John. R.* 108, 113.) There, the words of demise and covenant to pay a share of the crop, were almost literally, and clearly in legal effect, the same as here; and the contract was held to be a lease. The only difference was, in the length of the term. There, it was five years, with a right in either party to terminate it on six months notice; here, only one year, with a privilege in the occupiers to continue for another. The shortness of the term, I admit, may be evidence of an intent to hold the crop in common; but is that circumstance alone, able to overcome words of express demise and covenant to pay, which have a settled construction in the law? Had the covenant been to pay a fixed quantity, as 100 bushels of wheat, or two tons of hay, &c. though to come out of the produce of the farm, it seems to be perfectly settled that the lessor would have taken no present interest whatever. (*Dockham v. Parker*, 9 *Greenl.* 137. *Vid. also Newcomb v. Ramer*, 2 *John. R.* 421, in note.) And there is considerable authority, which does not appear ever to have been expressly repudiated, that a contract to render a moiety, especially

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where the contract is for a certain term, or for more than one crop, amounts to the same thing. (*Welch v. Hall*, Bull. N. P. 85, Lond. ed. of 1783. *Thompson and Livingston, Js., in Jackson ex dem. Colden v. Brownell*, 1 John. R. 267, 270, 1. And see *Hare v. Celey*, and *Stewart v. Doughty*, before cited.)

*Welch v. Hall*, has long been disregarded, and probably never was law. It held that a contract on shares for one crop, amounted to a lease. What was said in *Jackson, ex dem. Colden v. Brownell*, went on the distinction between letting on shares for a single crop, and for a year certain. In the latter case, it was said to be a demise, because for a year. That view was overruled in *Caswell v. Districh*. In the latter case the contract was in words of demise for one year; not in the usual technical terms I admit, but clearly such as, at a money rent, would have been construed to mean the same thing. Yet the contract was denied to be a lease, and the denial put on the ground that the payment by way of rent was in moieties, to be measured and given by the tenant. Mr. Justice Nelson said, "the shares were of specific crops to be raised on the farm," and he adds—"this view of the contract should be maintained, unless otherwise clearly expressed." He thought the case distinguishable from *Stewart v. Doughty*, where the phraseology being that usual in leases, could not be got over by the agreement to pay in shares from the specific crops. With deference, I have not been able to make any substantial distinction in the phraseology. Independently of the fact that the render was confined to a share in the specific crop, it would, as appears to me, in both cases, have operated to make a lease. In *Caswell v. Districh*, the agreement was to *let the defendant have the farm for one year*. These, says Woodfall, are apt words to make a lease, (*Woodf. Land. & Ten.* 7, Lond. ed. of 1804;) and so it was adjudged in *Whitlock v. Horton*, (*Cro. Jac.* 91.) The words in *Stewart v. Doughty* were no more; but if they were, Woodfall says, *the most proper and authentic form of words* may be overcome by a contrary intent ap-

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pearing in the deed of demise. (*Woodf. Land. & Ten.* 6, Lond ed. of 1804.) It seems to me therefore, that *Stewart v. Doughty* was very much shaken, not to say entirely overturned, by *Caswell v. Districh*; at any rate, that the question is open, whether the clearest words of present demise may not be considered as enuring to make a mere tenancy in common, under a letting like the one before us. And I am of opinion that they may. The compensation here lies wholly in shares from the farm products: in these, the owners are to be compensated for the use of their land, and the occupiers are to be paid for their labor. Indeed, as it respects the second year, from the crop of which the wheat in question was taken, the words of letting are almost identical with those in *Caswell v. Districh*. But it is a case in which we ought not to tie ourselves up to the consideration of mere words. The substance should be looked at; and that, as it would be universally understood among farmers, is an agreement between owners and occupants, that the latter should come in rather as servants, than tenants; each party taking an interest as common owners in the crops and other products, as they accrue, by way of compensation to the owners for the use of their farm, and the occupiers for their labor. (*Vid. Maverick v. Lewis*, 3 *McCord*, 211.) The extent of such compensation or interest, is to be collected from the contract. (*Vid. Beaumont v. Crane*, 14 *Mass. R.* 400.) This may be so framed as to secure an exclusive interest to the owner in certain products, such as the hay to be consumed on the farm; also an exclusive interest in the young animals to be fed there, till they come to be distributed. No doubt, any provision of this kind may be made, if not in fraud of the occupant's creditors. (*Lewis v. Lyman*, 22 *Pick.* 437.) But there being no such provision, a common ownership results in all products to be divided, in whatever form the provision may be for rendering or securing such products to either party. The true test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a

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tenancy in common arises, at least in such products as are to be divided. The occupier being a mere servant, it is said, cannot bring trespass *quare clausum fregit* ; but the owner only. (*Hare v. Celcy*, before cited. *Robertson v. George*, 7 *New-Hamp. R.* 306, 308.) His possession is that of the owner. (*Id.*, and *Maverick v. Lewis*, before cited.) He has no interest in the land which he can assign, and, on his death, the contract would be at an end. (*Id.*) All these views seem to follow from *Caswell v. Districh* ; and they are, some of them, ably sustained by the late case in Massachusetts. (*Lewis v. Lyman*, before cited.) Other cases certainly take opposite views. (*Weems v. Stallings*, 2 *Harr. & John.* 365. *Haskins v. Rhodes*, 1 *Gill & John.* 266.) And we have already seen, that even our own cases may be considered as somewhat in conflict. The more modern and maturely considered cases, both in this state and in Massachusetts, go, I think, clearly to sustain the right, both of the owners and occupiers, in the case before us, to be considered tenants in common. Though the whole be drawn up in the form of a lease, and a render as of rent, it is after all but another mode of saying, that the occupiers shall work the farm for so long, and divide the profits with the owners.

It follows, that the purchase of the wheat by the defendant operated as a contract with all the plaintiffs, though it was made with only one of them. And though the whole transaction were conducted in his name, the evidence was quite sufficient to warrant the referee in finding that he acted as agent for his co-tenants.

The result is, that the motion to set aside the report of the referee should be denied.

Motion denied

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 Williams v. Eldridge.
 

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## WILLIAMS vs. ELDRIDGE and others.

Where there was a stipulation between the attorneys, that either party might receive the return of commissioners authorized to take testimony, duly sealed, and deliver it to the clerk, which was done ; *held*, no objection to the reading of the testimony, that the direction on the return did not specify the clerk's *residence*, as required by 2 R. S. 394, § 16, *subd.* 4.

*Quere*, whether the form of the direction be essential in any case, where the commissioners' return in fact reaches the proper officer's hands ?

The deposition in this case was held properly read in evidence, though it did not appear that a copy of § 16 of said statute had been annexed to the commission.

If annexing a copy of that section were essential, the court, *it seems*, would intend it to have been done, unless the contrary were shown.

It will be presumed that the commissioner who took the testimony, closed and sealed the package himself.

That the papers composing the return are connected by *wafers* only, is not an objection to the deposition being read.

It need not appear by the return to a commission, that the oath was *publicly administered* to the witness, as that will be presumed to have been regularly done.

A commissioner to take testimony, is *quoad hoc* an officer of the court in which the proceeding is pending ; and his signature, like that of the clerk to an office copy, will be judicially noticed, though his name be not written at length.

On the same principle, the court will presume that the commissioner discharged his duty, by doing all those things in the execution of the commission which he is not bound specifically to certify as done.

Where several objections were made to the reading of a deposition, which the court, after taking time to deliberate, overruled ; *held*, that they had no right to preclude the party from raising other objections afterwards.

Counsel have an unqualified right to raise what number of objections they please to the admission of testimony ; and it is the duty of the court to hear and decide them.

*It seems*, that it is not the absolute duty of counsel to raise objections which go merely to form, and are only calculated to produce delay, or turn the party round to another action.

The party who calls a witness to prove that his adversary has admitted an account, may put it into the witness' hands, and then ask him the proper questions.

The objection to an interrogatory annexed to a commission, on the ground of its being leading, may be made when the answer of the witness is proposed to be read in evidence ; especially, when the interrogatories are annexed under a stipulation, expressly *saving all legal exceptions*.



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When a commission is directed to two, either or both of whom being authorized thereby to execute it, and the return is signed by only one of them, it will be presumed that he alone was present at its execution, though the words, "by virtue of a commission to *us* directed," appear in the caption of the return.

It is not a ground of error, *semble*, that the court at the trial allowed a leading question to be put by a party to his own witness, as that is matter resting in discretion; otherwise in respect to answers to leading interrogatories annexed to a deposition. If these are objected to on that ground, the court are bound to exclude them.

**ERROR** from the common pleas of Franklin county: The action below, was by Eldridge & Ransom against Williams, to recover the balance of a merchant's account, which was proved by the testimony of James Loney, the former clerk of the plaintiffs. This testimony was taken under a commission addressed to Solomon Y. Chesley and Guy C. Wood, of Cornwall, Upper Canada, authorizing them, or either of them, to act. And the attorneys stipulated that either of the parties, &c. might receive the commission, interrogatories, cross-interrogatories and deposition, from the commissioners, or either of them, duly sealed up, and deliver them thus sealed to the clerk of the C. P.; and that the affidavit of such party, &c. that he did so receive, and deliver the package unopened, should be evidence, and of like effect as if the commission were returned pursuant to the rule of court. The commission, &c. after being executed, was received by Eldridge, who delivered the same to the clerk, and made the requisite affidavit. The interrogatories were not settled by a judge; but the parties annexed their respective interrogatories and cross-interrogatories, and stipulated that they might be put to the witness, *saving all legal exceptions to the same*. The caption of the return annexed to the commission was—"Deposition of James Loney, produced, sworn, &c. on, &c. by virtue of a commission, &c. to *us* directed," &c.; and the deposition was signed, "S. Y. Chesley, commissioner," without the name of Wood. It did not appear on the papers returned, that a copy of the section, declaring the manner in which commissions are to be executed, had been annexed, pursuant to the act. (2 R. S. 315, 316, 2d ed. § 24,

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[§ 16 of 1st ed.]) The package containing the commission, &c. received and delivered by Eldridge, was directed to "U. D. Meeker, Esq. clerk, Franklin co., New-York," without mentioning his place of residence, as required by *id.* § 24, sub. 4, [§ 16 of 1st ed.]

The third direct interrogatory annexed to the commission was as follows: "Look upon the annexed account marked B., and declare how and which of said articles, mentioned in said account, were sold and delivered by the said plaintiffs to the defendant?" To which the answer was thus: "I have examined the annexed account marked B., and from the defendant's own acknowledgment, he bought and received from the plaintiffs all the articles therein charged." The fourth, and fifth direct interrogatories, were as follows: "Is the account correct, and is it a true copy and extract from the mercantile books of said plaintiffs?"—"Did you exhibit a copy of the account to the defendant, and did he admit it to be correct?" To each these, the witness answered affirmatively, giving dates, circumstances, &c.

On the plaintiffs below offering to read the deposition in evidence, the defendant objected on various grounds stated in the opinion of the court—all of which were overruled; and the defendant excepted. Other decisions were made, and exceptions taken thereto—the nature of which sufficiently appear in the opinion of the court. A verdict and judgment having been rendered for the plaintiffs, the defendant sued out a writ of error.

*J. H. Jackson*, for the plaintiff in error.

*J. Parkhurst*, for the defendants in error.

*By the Court*, COWEN, J. Objections were taken below to the form in which the papers were directed to the clerk, and for want of its appearing that a copy of 2 R. S. 315, § 24, 2d ed. [§ 16, 1st ed.] had been annexed to the commission; but neither objection is well founded. The particular form of the direction, (if in any case essential, where

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the package in fact reaches the proper officer's hands,) need not be pursued, except when direction is given for its return by a judge, &c. as required by the previous section, 23, [§ 15 of 1st ed.] Here, the manner of return was provided for by stipulation.

The provision as to annexing a copy of the section of the statute, was with the view to a correct execution of the commission. If the execution be in fact correct, it is enough. Beside, the commissioners are no where required to certify their instructions; and if the fact were important, the court below were bound to presume that the copy had been annexed, till the contrary appeared.

To the objection, that it did not appear by Eldridge's affidavit that the papers had been closed up and sealed by the commissioner himself, the answer is, that he must be presumed to have done it himself, it appearing they were sealed up. The annexing them together by wafers was sufficient. A tape and seal were not necessary.

The objection, that it no where appears that the oath was *publicly* administered to the witness, is answered by the presumption that the commissioner administered in correct form, and he is not required to return the form.

It is also said, that only one commissioner subscribed the deposition, while the word, *us*, in the caption, denotes that both were present. It does not necessarily denote the presence of both; and the deposition being signed by only one it must be intended that he alone executed the commission.

It is also objected, that the deposition is signed, S. Y. Chesley, when it should have been by his first name at length. But the abbreviation must be read with a view to the context, a part of which is, the annexed commission. That contains the name at length.

Commissioners under the act are, *quoad hoc*, officers of the court. Their return of evidence is, in effect, like an office copy made by the clerk of the very court to which he belongs. The court, knowing the real name of its officer, is every day in the habit of recognizing his signature

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as valid, though his first name be denoted only by initials. It is on that principle, too, that they will presume the commissioner discharged his duty, by doing all those things, in the execution of the commission, which he is not bound to return specifically as done.

The objections so far examined, were made in the court below on the 10th of October. They were overruled, the court deciding that the deposition might be read in evidence to the jury. At this stage of the cause, it being the evening of the 10th, the court adjourned till 8 A. M. of the 11th, when the defendant's counsel stated, he had two other objections to the admissibility of the deposition, which he proposed to offer for the consideration of the court. The opposite counsel insisted, that the objection should not be heard, as the court had already determined that the deposition should be read in evidence, and the court so decided.

Counsel have an unqualified right to raise what number of objections they please to the admission of testimony, whenever it is offered ; and a very common course is, to hear and decide each objection severally. The right is very important, as it is entirely settled, that unless the objection be mentioned, it cannot, in general, be presented to the appellate tribunal, whether on error upon a bill of exceptions, or by way of motion for a new trial. The court of original jurisdiction have power to abridge the discussion, either by allowing the objection at once, or overruling it as frivolous, or limiting the discussion to an opening, answer, and reply, by one or more counsel. When they have decided an objection specifically made, they may refuse to open the question for farther discussion, or to reconsider it ; but I doubt their power absolutely to decline the hearing of any objection which counsel may express a desire to present, until the testimony has been pronounced competent, and is in the progress of being read or otherwise submitted to the jury. It is not denied, that the additional objections might have been made, had not the court already decided, that the deposition was competent evi-

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dence, and should be submitted to the jury. But it should be added—"notwithstanding the objections specified." The court had not and could not have decided that other objections did not exist. *Non constat* that the counsel for the defendant had waived the right to add objections. He had mentioned quite a number, and the court had held them to be unfounded, and decided that they were not sufficient. I do not deny that they might refuse to reconsider their decision; but they gave it a broader construction than it would bear. Suppose that, on the counsel mentioning the first of his seven objections, the court had at once overruled it, as they might have done, and added, "the deposition must be read;" on the principle now contended for, they might, in this way, have cut off the other six objections; and, for aught I see, the more serious objections afterwards made to the form of certain interrogatories.

We have had occasion to observe some abuses from the vexatious multiplication of captious and frivolous exceptions, but cannot, for that reason, cut off or even qualify the right to take them at the proper stage of the cause, nor treat the right as waived, except in a very clear case. The character of the bar has been, and we have no doubt will continue to be, a guaranty against the general prevalence of such abuses; and the few instances in which professional integrity or honor may fail to operate as a restraint, will become still fewer, in proportion as they shall be found unprofitable to the client, and injurious to the counsel's reputation. In this remark I mean no allusion to any of the exceptions here taken, though I entirely concur in what has been said by Mr. Justice Washington, that counsel are not obliged, in any case, to make objections which go merely to form, and which are only calculated to produce delay, or turn the party round to another action. (*Russell v. The Union Insurance Co.*, 1 Wash. C. C. Rep. 441.)

In the progress of submitting the deposition to the jury, the defendant's counsel farther objected severally to those parts of it which answered the third, fourth and

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fifth interrogatories, on two grounds: first, because they were leading, and secondly, because the account, mentioned in those interrogatories, ought not to have been exhibited and given to the witness.

The account was properly put in the hands of the witness; for, the object of the interrogatories was to prove, among other things, that the defendant had acknowledged its correctness.

But we think the court erred, in deciding that the interrogatories were proper to be put to the witness. It is scarcely denied that they were leading, being calculated throughout to instruct the witness in what the plaintiffs desired him to answer. The stipulation, under which they were administered, saved all legal exceptions; and the statute, even when interrogatories are allowed by a judge, permits all questions of competency and credibility to be raised on the trial, in the same manner, and with the like effect, as if the witness were on the stand. (2 R. S. 317, 2d ed. § 31.) Among other objections, it expressly allows those which respect the *competency of any question* put to him. The questions objected to as leading, were most material. I admit that error would hardly lie for allowing a leading question to be put, on a personal examination, though it were to the party's own witness; for the court have a discretion, on discovering that the witness for a party is unwilling to permit leading questions. We might intend, perhaps, that a proper case for such a course of examination existed, unless the court below should declare the contrary in the bill of exceptions. But here there is no chance for such intendment.

**Judgment reversed.**

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Luqueer v. Prosser.

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**LUQUEER and others vs. PROSSER, impleaded with others.**

One who guarantees the payment of a negotiable note, absolutely, by an endorsement on it to that effect, made at or prior to its delivery to the payee, becomes, in legal effect, a joint and several maker, and may be sued as such by any subsequent holder.

The guarantor's liability, in such case, is the same as if he had signed his name directly to a joint and several note, as surety for the maker.

A common *due bill* is a promissory note, within the statute.

So, *semble*, of any simple contract in writing, importing an absolute engagement that money shall be paid; e. g. "I promise that J. S. shall receive £100"—or, "I will see that £100 is paid by J. S." &c.

ASSUMPSIT tried before MOSELEY, C. Judge, at the Yates county circuit, on the 8th of June, 1840. The action was by the plaintiffs, as bearers of a joint and several promissory note, made by Edson and Arnold, two of the defendants, payable to one Parsons or bearer. The note bore date April 10th, 1839. On the back thereof, Prosser, the other defendant, had signed the following—"For value received I guaranty the payment of the within note, and waive notice of non-payment. (Signed) D. B. Prosser."

The note thus endorsed was delivered to Parsons, as security for the price of a span of horses and a wagon, that day sold by him to Edson and Arnold. The agreement of sale was on condition, that they (Edson and Arnold) should give Parsons good endorsed paper; and this was received as a performance of that condition, and the property delivered accordingly.

The declaration contained only the common money count, with a copy of the note and guaranty; to which the defendant Prosser pleaded the general issue.

On the trial, after the testimony on the part of the plaintiffs was closed, it was objected on the part of the defendant Prosser—1. That he could not be charged as endorser: 2. That the plaintiffs could not recover against him, without counting specially upon the guaranty: 3. That no recovery could be had against him and the makers jointly 4. That his (Prosser's) undertaking was not negotiable

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A motion was therefore made for a nonsuit, which the circuit judge overruled; and a verdict was rendered in favor of the plaintiffs for the amount of the note. The defendant Prosser now moves for a new trial on a case.

*D. B. Prosser*, in pro. per.

*H. Welles*, for plaintiffs.

*By the Court*, COWEN, J. The absolute liability of Prosser is not denied; but it is made a question whether he can be treated either as endorser, or a joint or several maker with the other defendants; and it is insisted, moreover, that the note is not negotiable.

I think it will be seen, on authority, that he is liable with the other defendants as a joint and several maker.

In *Hunt v. Adams*, (5 Mass. R. 358,) Chaplin made a note payable to Bennet, the plaintiff's intestate, under which Adams wrote, "I acknowledge myself holden as surety for the payment of the demand of the above note." The court held an action to be sustainable by the payee, against Adams, as upon a promissory note. One court set out a joint and several note of him and Chaplin; and the other, a several note of Adams. Parsons, C. J. said that, as to the intestate, the two papers must be considered the joint and several promissory note of Chaplin and Adams; that it was the same thing in effect as if Adams' name had been signed directly to the note as surety. In *White v. Howland*, (9 Mass. R. 314,) one Taber made his note payable to Wm. White or order; on which the defendant, with another, endorsed, "For value received, we jointly and severally undertake to pay the money within mentioned to the said Wm. White." The court said, the case was within the reason of *Hunt v. Adams*, and the effect of the defendant Howland's signature the same as if he had signed the note on the face of it as surety; that is to say, according to *Hunt v. Adams*, the whole was to be taken as a joint and several promissory note by Taber, Howland and



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the co-signer with the latter. In *Hough v. Gray*, (19 Wend. 202,) Moon made his note payable to Cameron, or bearer, and Hough endorsed, "This may certify that I guarantee the payment of the within note." We held that he was liable as maker, severally, to Gray who had purchased the paper of Cameron. I remarked, that the court below were clearly right in holding that Hough was liable as a joint and several maker with Moon, the admitted maker; referring to the cases collected in *Dean v. Hall*, (17 Wend. 214,) among which are the two cases I now cite from the *Mass. Rep.* If the respective papers in those cases were in effect joint and several promissory notes, it followed that those in *Hough v. Gray* were such; and that they were negotiable, like a promissory note. These cases decide the present. Mr. Prosser's guaranty was the same in legal effect as if he had signed with Edson and Arnold as surety. His promise was absolute; not a mere commercial endorsement. In *Allen v. Rightmyer*, (20 John. R. 365,) the court said of such an undertaking, "it is absolute, that the maker shall pay the note when due, or that the defendant (the endorser) will himself pay it." How is this distinguishable from a direct signature as *surety*? In the latter case, both promise to see the money paid at the day. A man writes thus—"I promise that \$100 shall be paid to A. or bearer;" who would doubt that such a promise would be a good note? The use of the word *guaranty*, or *warrant*, or *stipulate*, or *covenant*, or other word importing an obligation, does not vary the effect. Read the obligation of a man who signs a note with his principal, "A. R. *surety*," both and each virtually stipulate in the language of the note I have supposed. Both promise that the payee *shall receive*. In *Morice v. Lee*, (8 Mod. 362, 4,) Fortescue, J. said, "I promise that J. S. or order shall receive £100," is a good note. Suppose it to stand, "shall receive £100 of *James Jackson*;" or, "I will see that £100 is paid by James Jackson:" all this, and the like, is no more than saying, I will pay so much by the hand of another. If there be, in legal effect, an absolute promise that money shall be paid, all the rest is a

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dispute about words. A note is payable to A. or order, and he endorses it to B. thus: "Pay the contents to B.—I waive presentment and notice as endorser:" this is a good promissory note. The law raises an absolute promise on such an endorsement. No doubt it enures as an endorsement for the purpose of transferring the principal note; but it is moreover an absolute promise to pay. It is saying, "so much is, without condition, due from the endorser to the endorsee." And a common due bill is a note. (*Kimball v. Huntington*, 10 *Wend.* 675, 679, 680.) The whole inquiry is, does the paper import an engagement that money shall be paid, absolutely? If it do, no matter by what words, it is a good note.

Then, on the question whether this note be joint or several or both: "I promise to pay," signed by two, is joint and several. (*Chit. on Bills*, 561, *Am. ed. of 1839.*) Each engages for himself and both. It is the same thing, where one promises as principal, and the other as surety, and whether they both sign on the same side of the paper, or on different sides. *Each* engages and *both* engage for payment of the same sum, at the same time, and to the same person; their obligations are identical throughout; both papers make but one instrument. When the endorser says, "I guaranty the payment of the within note," he promises the future holder, as well as the payee. The authorities say rightly, he has done the same as if he had signed as surety. By reference, the guaranty becomes a part of the principal note. The guarantor becomes surety for the note as it is, payable *to bearer*, without declaring that he will engage to any other than the payee.

That the guaranty in question does not come up to the definition of a promissory note, we are referred to *Oxford Bank v. Haynes*, (8 *Pick.* 423) In that case, it was certainly held, that the words "I guaranty the payment of the within note," signed by the guarantor, made him liable as such, but not as surety; in other words, the court denied to such an endorsement the operation of a promissory note. But the decision was based on a rule as to the mode of fix-

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ing guarantors peculiar to that state. The court admitted, that if the engagement were to be considered absolute, it was a promissory note; but they considered it conditional, and, under some circumstances at least, as requiring presentment and notice, to fix the guarantor; and such is the doctrine of some other states. It is, however, unknown here. It was repudiated in *Allen v. Rightmyer*, and often since; in one case, very lately, on a review of several decisions by the courts of the U. States and by the state courts.<sup>(a)</sup> This distinction prevailing in Massachusetts, of course makes all the difference. With our rules as to charging guarantors, the learned court in Massachusetts virtually concede, that the defendant's guaranty would be considered a note, even there. Another case cited for the defendant, proceeded on the same ground as that of *Oxford Bank v. Haynes*. It is *Green v. Dodge*, (2 *Hamm. Ohio R.* 430, 439.) Another, (*Cumpston v. McNair*, 1 *Wend.* 457,) went on the ground that the guaranty was not, as in this case, absolute, but was made conditional by its own express provisions. All three of these cases will be found, when their principle is seen, to be in favor of the views I have expressed concerning the guaranty now in question. I am aware of no case the other way. *Non constat*, in *Meech v. Churchill*, what was the language of the guaranty. The case is very far from deciding the present.

New trial denied.

(a) *Douglas v. Howland*, (24 *Wend.* 35.)

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Stevens v. The People.

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## STEVENS vs. THE PEOPLE.

It is no objection to the validity of a record of conviction by the general sessions, that the judge who signed it was not such when the conviction took place, but received his appointment afterwards.

An indictment for petit larceny, charging it as a second offence, is good, though, in respect to the first offence, it merely alleges that the defendant *was convicted*, &c., without averring in terms a *judgment* or *sentence*, and though it does not specify the property to which the first offence related, or the person from whom it was stolen.

Otherwise, however, if the indictment omits to aver, that the defendant had been *pardoned*, or *otherwise discharged from the first conviction, before the commission of the second offence*.

ERROR from the Schenectady general sessions. Stevens was indicted for petit larceny. The first count was for petit larceny simply. The second was for petit larceny, as a second offence; alleging, by way of showing the first offence, that at a former general sessions in the same county, Stevens *was convicted of the crime of petit larceny*, but giving no particulars.

On the trial, the public prosecutor procured a record of the former conviction, to be made up and signed by A. L. Linn, Esq. then a judge of said court; but because he was not so at the time of the former conviction, Stevens' counsel objected to its being received in evidence. The objection was overruled, and the counsel for Stevens excepted.

The following objections, also raised at the trial, were now again insisted on: 1. That the second count in the present indictment, does not aver any judgment or sentence on the former conviction: 2. It does not show of what property Stevens was before convicted of stealing, nor the name of the owner, nor does it contain any description of the offence: 3. It does not show that Stevens had been pardoned or otherwise discharged from imprisonment under the first conviction, prior to the commission of the second offence.

These objections were all overruled at the trial, and Stevens' counsel again excepted. The jury gave a general

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verdict of guilty, upon which judgment was rendered accordingly; and the defendant sued out a writ of error.

*A. C. Paige*, for the plaintiff in error.

*P. Potter*, (district attorney,) for the people.

*By the Court*, COWEN, J. There is nothing in the first objection. Judge Linn had authority to sign the record.

The second objection is also without foundation. 'The statute is, that every man having been *convicted* of petit larceny, and having been pardoned or otherwise discharged, who shall be subsequently convicted of petit larceny, &c. shall be punished in the state prison. This provision is collectable from 2 R. S. 584, 2d ed. § 9. The word *conviction* is enough; for in this, the statute is pursued.

It is enough, for the same reason, to say, the prisoner was convicted of petit larceny, without giving particulars. The mere conviction of petit larceny, is the material fact. The third objection is therefore unfounded.

But there is another ingredient essential to the aggravated offence intended to be charged in the second count, which is not mentioned there. The statute requires not only a former conviction, but that the prisoner shall have been *pardoned* or *discharged*. It follows that either a pardon or discharge must be averred in the indictment. (1 *Chit. Cr. Law*, 280, *Am. ed.* of 1836.)

It is said, that such cannot be the construction of the statute, as it would lead to this absurdity: the prisoner would not be subject to the aggravated punishment should he escape from prison and then steal, which is thought a much more fit case for increasing the punishment than where he has been pardoned, or discharged in due course of law. That we might possibly say, were the words open to construction; but they are direct and plain. When a statute makes a pardon or discharge the condition of increased punishment, on what rule can we say it shall be increased without either? We might, perhaps, in a civil case, give

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it an equitable extension, so as to cover circumstances exactly within its reason or principle; but not in a case of crime. Besides, if we had the power of construction, how can we say the legislature did not intend that the first punishment should take its regular and usual course, as a lesson of moral reformation, before the offender should be deemed a fit subject for the enhanced penalty? (*Vide 3 R. S. 834, 2d ed. Revisers' note on § 9, there.*)

On the *fourth* objection, therefore, we think the judgment must be reversed.

Judgment reversed.

## HOWARD, president, &amp;c. vs. IVES.

Where H. an endorsee of a bill of exchange, endorsed it to a bank for the mere purpose of collection, and the notary employed by the bank transmitted notice of protest by mail to H. on the next business day after presentment, &c. who, on the next day after receiving it, mailed notice to his endorser: *Held*, sufficient to fix the liability of the latter, though, had the notice been sent directly to him, he would have received it sooner; and this, *semble*, whether the notary be regarded as H.'s agent, or that of the bank.

A bank, however, receiving a bill of exchange in this way, is a principal for the purpose of transmitting notice of protest, and consequently a notary entrusted by it for that purpose is *its* agent.

The *next day*, in the sense of the rule as to reasonable notice of protest through the post, is the next *business day*; and therefore, where protest takes place on *Saturday*, a notice mailed on the following *Monday* is in time.

If two mails leave on the day for sending notice, and one closes before the usual business hours, a notice is regular if transmitted by the other.

Whether, if there are several mails leaving on the same day at different hours, the party may in all cases elect by which he will send, *quere*.

In charging consecutive endorsers by notices from one to the other, the party receiving notice is never bound to forward it to his immediate endorser on the *same day* it reaches him, but may wait till the *next*.

ASSUMPSIT, tried at the Saratoga circuit, in May, 1840, before WILLARD, C. Judge. The action sought to charge the defendant as endorser to the plaintiff of a bill of exchange, drawn on and accepted by one Webster, of the city of New-York. The plaintiff had endorsed it to the Union Bank of that city, for collection; and the latter gave it to their notary, who presented and protested

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it for non-payment, on *Saturday*, August 31st, 1839, between the hours of three and five P. M. On *Monday* following, the notary mailed notice of protest to the plaintiff, enclosing another for the defendant, in season for the New-York five o'clock mail to Troy; at which latter place the plaintiff resided. The plaintiff received these on *Tuesday* following, at eight o'clock, A. M.; and the same day, after nine o'clock, A. M., the notice of protest intended for the defendant, was mailed at Troy, directed to him at Lansingburgh, his place of residence; but the mail for the day had closed before this was done. It appeared in evidence that the course of mails from New-York to Troy, was as follows: One mail was closed on Saturday at three o'clock P. M., and started at five P. M.—two left on Sunday—and, on Monday, one closed at half past five A. M., leaving at seven A. M., but there was no other on that day except the one by which the notice in question was sent.

The defendant objected to the plaintiff's right of recovering, on the following grounds: 1. That notice of protest should have been mailed at New-York in time for one of the mails which left on Sunday; or, at all events, in time for the Monday morning's mail; 2. That the notice mailed at Troy, by the plaintiff to the defendant, should have been deposited in the post office before the mail for Lansingburgh had closed; 3. That notice should have been mailed at New-York directed to the defendant at Lansingburgh.

The circuit judge overruled the objections; whereupon exceptions were taken, and the defendant now moved for a new trial on a bill of exceptions.

*C. L. Tracy*, for defendant.

*S. G. Huntington*, for plaintiff.

*By the Court*, COWEN, J. For the purpose of transmitting notice of protest, the Union Bank, though in fact a mere agent to collect, must be regarded as a principal. The legal interest in the bill passing by endorsement to that bank, it must be considered the holder at the time when the bill was presented for payment; and the notary must be considered, therefore, as servant

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to that Bank. (*Mead v. Engs*, 5 Cowen, 303, 308. *Scott v. Lifford*, 9 East, 347.)(a) According to the last case cited, probably the same time would be allowable whether the Union Bank be regarded as a mere agent, or as principal. (*And vide Haynes v. Birks*, 3 Bos. & Pul. 599, 601.)(a)

But whether this is so or not, it was regular to mail the notice to the plaintiff, on the next day after presentment and protest. The holder is never required to mail notice to his endorser the very day on which default is made in payment. (*Chit. on Bills*, 513, *Am. ed. of 1839*, and the cases there cited.)

The *next day*, means the next *business* day. Here, the protest being on Saturday, the notice was properly mailed on the next Monday, leaving the intermediate Sunday out of the computation. (*Id.* 519.) *Haynes v. Birks*, before cited, is in point. (*Vide also Wright v. Shawcross*, 2 Barn. & Ald. 501, note.)(b)

Mailing in season for either of the two mails on Monday was sufficient. It is urged, that the morning post was neglected; but the mail for that post closed before the common hours of business. The question is, whether the holder used ordinary diligence? It is not necessary to say that in all cases where there are several mails on the same day, the party may elect by which he will send. Clearly he comes to the mark, when he selects that post which leaves next after the hours of business commence for the day. This is the next practicable or convenient post. (*Mead v. Engs*, 5 Cowen, 307, *per Sutherland, J.*)

The mailing by the plaintiff at Troy was clearly in season. It was done the very day on which the plaintiff received notice, no matter whether before or after the post had departed for Lansingburgh. In this method of charging endorsers and drawers, by consecutive notices from one party, to the next immediately preceding him, the former is never bound to forward notice on the very day upon

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(a) And see *Church v. Barlow*, (9 Pick. 547;) also, *Colt et al. v. Noble*, (5 Mass R. 167.)

(b) *Eagle Bank v. Chapin*, (3 Pick. 180.)



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which he receives it; but may always wait till the next (*Chit. on Bills*, 515, 516, *Am. ed. of 1839. Chit. jun.* 62, a, 63, *Am. ed. of 1834. Bayley on Bills*, 264, *Am. ed. of 1836. Bray v. Hadwen*, 5 *Maule & Selw.* 68, 70, and cases there cited. *Williams v. Smith*, 2 *Barn. & Ald.* 496, 500. *Geill v. Jeremy*, 1 *Mood. & Malk.* 61.)(c) The motion for a new trial is therefore denied.

Rule accordingly.

(c) See *Eagle Bank v. Chapin*, (3 *Pick.* 180.)

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### BROWN and another vs. ARTCHER AND VAN VLIET.

In trespass *de bonis*, a plea that the goods in question were the property of a third person, and that the defendants took them by virtue of an attachment against him, is bad, as amounting to the general issue; for it involves a denial of the plaintiff's possession, and therefore gives no *color* to the action.

Otherwise, if the plea surmise a possession in the plaintiff, under some defective title.

The same general doctrine applies in trespass *quare clausum fregit*, with respect to a plea of title in a third person, under whose authority the defendant entered, &c; for the plea is a virtual denial that there was any trespass.

The usual test in ascertaining whether a plea amounts to the general issue, is to see if it takes away all *color* for maintaining an action, by fixing a negative on the plaintiff's right in the first instance.

DEMURRER to pleas. The declaration was for trespass *de bonis*, &c. and contained two counts, both of which alleged the taking by the defendants of certain goods, &c. *the property of the said plaintiffs.*

The defendants pleaded separately: 1. The general issue; 2. Proceedings against one Corl, a resident of the city of Detroit, in the state of Michigan, as an absent debtor, at the suit of the defendant Van Vliet, and one Hart; and that Artcher, under an attachment issued therein, seized the goods as sheriff of Albany. These pleas averred respectively, that *the goods belonged to Corl.* They also interposed a 3d plea, not materially different from the second.

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The plaintiffs demurred to the special pleas, assigning for cause, among other things, that *they amounted to the general issue* ; and the defendants joined in demurrer.

*J. Van Buren*, for the plaintiffs.

*S. Stevens*, for the defendants.

*By the Court*, COWEN, J. It was held in the *Year Book*, (27 H. 8, 21, case 11,) that, in trespass *de bonis*, a plea that the goods were not the plaintiff's property was bad. The same thing was afterwards admitted in *Wildman v. Norton*, (1 Ventr. 249 ; 2 Lev. 92, S. C. nom. *Wildman v. North*.) I believe it has never been denied. Chitty says that "the defendant cannot plead property in a stranger or himself, because that goes to contradict the evidence which the plaintiff must adduce on the general issue in support of his case." (1 Chit. Plead. 527, Am. ed. of 1840.) The usual test of an objection that the plea amounts to the general issue is, whether it takes away all *color* for maintaining an action, by fixing a negative upon the plaintiff's right in the first instance. Thus, in trespass *quare clausum fregit*, the defendant pleading title in a third person, a demise to himself and an entry under that demise, this plea was held bad, because it shewed a right of possession in the defendant at the time when he entered and committed the trespass complained of. (*Collett v. Flinn*, 5 Cowen, 466.) So, a plea that he entered under a licence from such third person. (*Underwood v. Campbell*, 11 Wend. 78.) Such a plea standing alone, virtually says, that the defendant did not commit any trespass in the plaintiff's close ; and is, therefore, but another mode of pleading not guilty. It absolutely and necessarily denies all possessory right in the plaintiff, the contrary of which he must maintain, or he is not entitled to sue. Such a plea is said, by the books, in itself to take away all *color* or pretence for an action ; and therefore, to be maintainable as a special plea, it must surmise some possession in the plaintiff, at the time, under color of a defective title. Taking away, in itself, all *implied color*, it

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must, in the manner mentioned, substitute what is called *express color*. (1 *Chit. Plead.* 529, *Am. ed.* of 1840. 5 *Coven.* 167, 8, *note.*)

The same rule of pleading has been applied to trespass *de bonis*. (1 *Chit. Plead.* 530, *Am. ed.* of 1840. *Leyfield's case*, 10 *Rep.* 90.) Chitty says, a plea that A. was possessed of the goods in question as of his own proper goods, amounts to a denial that the plaintiff had any property in them, and therefore gives no *color* of action in itself. To remedy this defect, it must surmise that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them; or, a possession of the plaintiff under some other defective title. (*Vid. Fletcher v. Marillier*, 9 *Adolph. & Ellis*, 457.) It is peculiar to the action of trespass, that the defendant may surmise such possession, setting up a mere fiction, not traversable, and thus turn what would otherwise be defective as amounting to the general issue, into a special plea. (1 *Chit. Plead.* 530, *ed. before cited.*)

But if such express color be not given, the plea of property in a stranger, or the defendant, is emphatically defective, in the case of trespass *de bonis*; for there, especially, no actual possession being expressly shown in the plaintiff, the law intends that it is with the general owner. Accordingly, the common count alleges merely that the things taken were *the goods of the plaintiff*, without otherwise showing possession. (2 *Chit. Pl.* 859, *Am. ed.* of 1840.)

In the case at bar, all the pleas demurred to aver that the goods in question were the goods of Corl; each following out the averment with the allegation that the goods were therefore taken by an attachment against Corl. According to the books cited, had the pleas stopped with the averment of property in Corl, giving, as they do, no express color, they would have been bad as amounting to the general issue. Such an averment alone would have cut off all *implied* color; for it would be saying, they were not the plaintiff's goods, in manner and form as he has alleged in declaring.

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This being so, the farther allegations, showing a lawful authority under the attachment to take them as the goods of Corl, certainly cannot help the pleas. To this, *Hallet v. Birt*, (12 *Mod* 120,) cited by the plaintiff's counsel on the argument, is, as he supposed, in point against the defendant. The plea there was, that the plaintiff had taken and impounded property belonging to A., at whose suit the defendant, under a warrant directed to him, replevied the property. This was held bad; though the court agreed that if the plea had said, the plaintiff took and detained the property, and so it had been taken by the defendant *from the plaintiff's possession*, it might have been well enough. That is probably one mode of giving express color.

It was supposed by the defendant's counsel, on the argument, that the pleas, by not expressly denying the plaintiff's possession, confessed it, and so there is implied color; whereas it is expressly said, in *Wildman v. North*, (2 *Lev.* 92,) that a plea of property in a stranger, with a traverse that the goods belonged to the plaintiff, in trespass amounts to the general issue, though not in replevin. And it is on the authority of this case, among others, that Chitty says, the simple plea of *property in a stranger* would be bad in trespass. *Stephen on Pleading*, 179, (*Am ed of 1824*,) says, the general issue is applicable, if the defendant did take the goods, but they did not belong to the plaintiff. And it is said in *Bacon's Abridgment*, (*tit. Pleas & Plead. G. pl. 3, p. 372, Am. ed. of 1813*,) that if, in trespass, the defendant plead property in a stranger or himself, it amounts to the general issue. (*Gould's Plead. pt. 2, ch. 6, § 78, p. 345, 1st ed. S. P.*) Such uniform language cannot be accounted for, unless, as I have already supposed, the allegation of property in a third person involves a denial of the plaintiff's possession.

The objection we have thus examined, applies to all the pleas, and we are of opinion it is well taken.

It is not necessary to say, whether there be any foundation for the other objections of form specified by the demurrers.

Judgment for plaintiffs.

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Starr v. Peck.

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## STARR and others vs. PECK.

On a question as to the legitimacy of A, it appeared, that her parents had been intimate in the way of courtship for nearly a year before her birth—that they intended to be married—that the father, being a sea-faring man, left on a voyage, and was accidentally detained longer than he expected—that A. was born a few days before his return—that within a week or so after, they were publicly married by a clergyman—that they subsequently cohabited as husband and wife for many years, and until their separation by death, always treating A. as their legitimate child: *Held*, sufficient to warrant a jury in finding that a marriage in fact existed previous to A.'s birth, notwithstanding the ceremony which took place afterward.

In the absence of proof as to what was the law of Connecticut respecting marriage, the court presumed that the common law prevailed there.

At common law, no formal ceremony is requisite to give validity to a marriage; but a contract between the parties *per verba de presenti*, is enough.

So, *semble*, of such a contract in certain cases, though *executory* in form, if followed by cohabitation; for the acts of the parties may be taken as giving a construction to their words, and rendering them presently operative.

The presumption of innocence is almost as strong, in respect to alleged acts of immorality, as in respect to the commission of crime.

Breach of private duty, negligence, fraud, &c. are not to be presumed.

Cohabitation between a male and female is to be presumed innocent and lawful, unless there are circumstances marking the case as one of prostitution.

EJECTMENT, tried at the Albany circuit, October 15th, 1840, before CUSHMAN, C. Judge. The land in question was formerly owned by Samuel Starr, deceased. The plaintiffs claimed as the children and heirs at law of Chauncey Starr, deceased, a son of said Samuel. They and the defendant were the only persons entitled to the land. It was admitted by the defendant, that the plaintiffs were entitled to one half. The defendant owned the right of Abby Peck, deceased, a daughter of said Samuel by Sarah Barnes, to whom he (Samuel) was married, and who was also the mother of Chauncey Starr, the plaintiffs' father; but the defendant's claim was controverted, on the ground that said Abby was illegitimate, having been born, as alleged, before said Samuel and Sarah were married.

At the trial, it appeared that the said Samuel and Sarah

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were formally married by a clergyman at Middletown, Connecticut, more than fifty years ago. Both were dead, having cohabited as husband and wife for many years, and until their separation by death. Their children were the said Abby and Chauncey. Abby was born ten days before the marriage ceremony. Samuel had visited said Sarah in the way of courtship, for about a year previous to the marriage. He followed the sea; and was at sea when Abby was born. Sarah had given out that they were engaged before he went to sea; and they were married, as mentioned, in a week after his return—he having been detained longer than was expected, when he left. Abby lived with them till her marriage, and was always afterwards received and treated by both as their legitimate child.

The judge left it to the jury, whether there had not been a marriage in fact before the ceremony, and before said Samuel was last at sea. To this the plaintiffs' counsel objected, insisting, among other things, that there was no evidence from which the jury could find that a legal marriage had taken place before the birth of said Abby. The jury found a verdict in favor of the defendant, and the plaintiffs now move for a new trial on a case.

*D. Burwell*, for plaintiffs.

*M. T. Reynolds*, for defendant.

*By the Court*, COWEN, J. The single question for the jury was, whether Abby, the person under whom the defendant claims, was a legitimate child. They found that she was; and it is now insisted, that the verdict was against the weight of evidence. She was born some week or ten days before the marriage ceremony, and while her father was at sea; and there is no direct evidence of any marriage, nor perhaps of any engagement to marry before that time; though there can be little doubt, that the parties had at least agreed to be married, and the ceremony was delayed till after Abby's birth, in consequence of the proposed husband's accidental detention on his voyage.

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But it is true, that the parties had power to contract marriage *inter se*, before the husband went to sea, without the intervention of a clergyman. (*Fenton v. Reed*, 4 John. Rep. 52.) Such is the common law, which we must presume was the law of Connecticut at the time, in the absence of proof to the contrary. And it is insisted, that the circumstances were sufficiently strong in favor of such a marriage, to warrant the jury in finding that it took place. The public celebration or ceremony is sought to be explained, by saying, that it might very properly have been required for the satisfaction of the parties, the family and the public; and the long time during which Abby was received and treated as a legitimate child in her father's family, is insisted on as a positive circumstance. To this may be added, the presumption that the parties would not indulge in a connection which was immoral, not to say criminal, especially when they might, themselves alone, have rendered it innocent, by a marriage contract *per verba de præsenti*. We are to presume against a notorious act of immorality almost as strongly as we would against the commission of a legal crime. (*Vid. Cusack v. White*, 2 Rep. Const. Ct. So. Car. 282.) A woman married in a little more than twelve months after her husband went abroad; he was not afterwards heard of; and the wife continued to cohabit with her second husband. It was presumed, in favor of the legitimacy of their children, that her first husband was dead at the time of her marriage with the second. (*Rex v. Twynning*, 2 Barn. & Ald. 386.) In *Emmett v. Norton*, (8 Carr. & Payne, 506,) Lord Abinger, C. B. told the jury, that, though the husband and wife lived in a state of separation, they were not to presume that it was for adultery, or because the husband had turned her out of doors; but rather some innocent cause, e. g. a difference of temper. Where a bailor loses goods, negligence is not to be presumed, but must be proved. (*Brind v. Dale*, *id.* 207.) Various other cases might be mentioned, wherein the law presumes against the slightest violations of duty in the business and other relations of private life.

(*Vid. Sill v. Thomas, id. 762, and Hunck v. Hooper, 7 id. 81.*) Honesty, not fraud, is to be presumed. Thus, the law presumes not only against morality, but even the venial offence of negligence, or breach of private duty. The principle was applied to the case of a marriage *de facto*, in *Fenton v. Reed*. There, a woman's marriage was publicly solemnized with another man, while her first husband was alive. She continuing after his death to cohabit with the other, a marriage *de facto* was held to be presumable by the jury. The presumption in that case, too, was allowed in favor of a right personal to the woman herself; *a fortiori* should it be allowed in favor of the legitimacy of her children. The only difference between the case cited and the one at bar is, that there the parties publicly cohabited, after the solemnization; while here, they secretly cohabited before. In both, there was a subsequent and perfectly amicable cohabitation, during the lives of the parties. In either case, it must be admitted that, from appearances, it was open to infer a reliance by the parties on their public marriage alone; and that they had never contracted a private one, nor ever thought of doing so. In the reported case, however, I think the inference quite as strongly warranted, as in this; and yet, it was allowed to be overcome by adverse circumstances of no greater strength. Secret cohabitation, pregnancy and birth, followed by immediate solemnization and public cohabitation for life, would seem to furnish considerable evidence that the parties had agreed, before that connection which resulted in pregnancy, to consider themselves as married in fact. The case bears no feature of heartless prostitution. The proofs are plain, that the object of both parties was marriage; and it seems not at all extravagant to presume, in favor of the female at least, that before submitting to a connexion which she must otherwise have considered criminal in the highest degree, she would have required such a form of contract as to change its character. Nothing appears in the case leading one to suppose that her husband would have hesitated in making such a contract;



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and that it was not publicly acknowledged and solemnized before the birth of the child, may be set down as the result of his accidental detention at sea, for a considerably longer time than the regular course of his voyage required. No peculiar form of words is necessary to such a contract. In *Morton v. Fenn*, (3 *Doug.* 211,) it appeared that the defendant promised to marry the plaintiff, if she would go to bed with him that night, which she did, and lived afterwards with him a considerable time. Lord Mansfield remarked that, before the marriage act, this would have been a good marriage, and the children legitimate, by the rules of the common law. (*Holt, C. J. in Wigmore's case*, 2 *Salk.* 438, *S. P.* *Dumarsly v. Fishly*, 4 *Marsh. (Ken.) Rep.* 372, *S. P.*) Thus, a contract in words merely executory, followed by the act of the parties in lying together on the faith of such contract, is equivalent to words of present import. The circumstances are to be taken as giving a construction to the words, and rendering them presently operative. (3 *Marsh. ut supra.*) The evidence in the case at bar may, I think, be considered quite strong that Abby's parents had, before her birth, made a contract of marriage, either *per verba de præsenti*, or *futuro*; and whether in one form or the other, the consummation which resulted in her birth, according to the cases cited, rendered the marriage complete.

It seems to us, therefore, that the learned judge was right in submitting the question of a marriage in fact to the jury.

BRONSON, J. dissented.

New trial denied.(a)

(a) See 2 *Roper on Husband and Wife*, (Jacob's ed.) p. 461, et seq.

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Bank of Rome v. Curtiss.

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**BANK OF ROME vs. CURTISS, sheriff, &c.**

In an action against a sheriff for neglecting to levy and return an execution, it appearing that the defendants, or some of them, had sufficient property out of which he might have satisfied it; *held*, that he was liable *prima facie* for the whole amount due on the judgment, and it is no answer that the defendants are still able to pay.

The sheriff may mitigate the damages in such an action, by showing that he was unable to collect by an exercise of proper diligence, as, if the defendant in the execution was insolvent; or, he may show that the plaintiff himself was the cause why the whole was not collected.

CASE against the defendant, sheriff of Oneida, for neglecting to collect and return a *fi. fa.*; tried at the Oneida circuit, in October, 1840, before GRIDLEY, C. Judge.

No affidavit of merits having been filed, the cause was tried as an inquest; and on the trial, the plaintiffs proved, among other things, that on the 4th of January, 1838, a *fi. fa.* in their favor was delivered to one Blair, then deputy and under sheriff of the defendant, to be executed; the *fi. fa.* was issued out of this court on a judgment against Tucker, Dunham and Stephens, directing the sheriff to levy, &c. \$661,43, with interest from 16th October, 1837, together with the fees, &c.; and was returnable on the 13th of January, 1838. The plaintiff also proved, that the execution had not been returned: that Dunham and Stephens, while the execution was in the officer's hands, had personal property within the county, which might have been levied on, sufficient to satisfy it.

The defendant proved, by a cross-examination of the plaintiffs' witnesses, that, although Dunham had failed, Stephens was still abundantly able to pay the judgment and execution. And his counsel asked the judge to charge, that the plaintiffs could only recover such amount as they had lost by his neglect, and not the amount remaining due and unpaid. The judge refused so to charge; and directed the jury that, although the defendants in the execution were still able to pay, the plaintiffs were entitled to recover the

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full amount of the execution, or so much thereof as remained unpaid. The defendant excepted. Verdict for the plaintiffs for \$235, the amount claimed as unpaid. The defendant now moved for a new trial, on a bill of exceptions.

*Mattison & Crocker*, for defendant.

*Stryker & Comstock*, for plaintiffs.

*By the Court*, COWEN, J. I think the learned judge was right, in directing a verdict for the full amount of the unpaid sum endorsed on the *fi. fa.* There were goods sufficient, in the hands of the defendants, or some of them, to satisfy it. Of these, the sheriff neglected to levy the amount, and unwarrantably delayed to return the *fi. fa.* For such neglect, especially in respect to final process, he is *prima facie* liable to pay the whole debt; and conclusively so, unless he can mitigate the amount, by showing that he was unable to collect by an exercise of proper diligence; as, if the defendant in the execution were insolvent, or the plaintiff himself have been the cause why the whole was not collected. The rule was thus laid down by Parker, J. in *Weld v. Bartlett*, (10 *Mass. R.* 474,) and we think, correctly. It was repeated and enforced in the subsequent case of *Young v. Hosmer*, (11 *id.* 89, 90,) to a greater extent, and with more severity, than is necessary to uphold the judge's charge here. The same rule was adopted by this court, in an action against the surety for the jail limits. (*Kellogg v. Munro*, 9 *John. R.* 300, 302.) The books to this point are considered in *Patterson v. Westervelt*, (17 *Wendell*, 543,) where, substantially, the same rule was adopted in respect to an escape from mesne process.

New trial denied.

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Rudd v. Davis.

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## RUDD and another vs. DAVIS.

In an action under the New-York city lien law, (*Sess. Laws of 1830, p. 412, and Sess. Laws of 1832, p. 181.*) brought to charge the owner of a building for labor and materials furnished the contractor; *quere*, whether it can be made a ground of recovery, that the contract, so far as a certain note of a third person, therein agreed to be taken as part payment, is concerned, was originally entered into, and the note delivered, in fraud of the *material men*.

Upon service of the attested account, the owner becomes liable for any balance due from him to the contractor at that time, or accruing afterward; and the claimant is regarded as an assignee, *pro tanto*, of the contractor's demand.

After the plaintiff in such action has proved his account, and a substantial performance of the contractor's agreement with the owner, this is *prima facie* sufficient to show moneys due the contractor, out of which the plaintiff is entitled to be paid; and if the fact is otherwise, the *onus* of proving it is on the defendant.

The case of *Haswell v. Goodchild*, (12 *Wendell*, 373,) commented on, and explained.

ON error from the New-York common pleas. Rudd and Rudd sued Davis, under the New-York city mechanics' act. (*Sess. Laws of 1830, p. 412, and Sess. Laws of 1832, p. 181.*) Their attested account, which was for labor done, and materials furnished, amounted to \$968, and was served a few days after the substantial completion of the building contract. Harold Geer was the contractor. He was, by written contract, to erect certain houses for Davis, for \$37,600, payable by instalments; the last payable when the work was finished. \$2344 were, by the terms of the contract, payable in the notes of Seth Geer.

The plaintiffs, after proving their account, and a substantial performance by H. Geer, rested. The court held they must be nonsuited, unless they gave farther proof of money due under the contract at the time when the account was served. To this the plaintiffs excepted.

The plaintiffs then gave evidence tending, as they insisted, to show, that the contract, so far as it respected the note of \$2344, was made, and the note finally delivered in payment, with a view to defraud the *material men*. In

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this they altogether failed, in the opinion of the court, who nonsuited them. To this also the plaintiffs excepted; and after judgment, sued out a writ of error.

C. O'Conner, for plaintiffs in error.

J. L. Mason, for defendant in error.

*By the Court*, COWEN, J. Admitting that fraud of the character sought to be established, would form a ground of recovery, (which is quite questionable,) there was clearly no evidence of it which would warrant the court below in submitting the question to the jury.

But we think the court erred in holding, that the plaintiffs were bound to do more, in the first instance, than prove performance by H. Geer, the contractor and principal debtor. *Pro tanto*, the plaintiffs were assignees of H. Geer's demand against Davis, (21 *Wendell*, 405,) who, had he been sued by H. Geer, must have taken the burthen of proving payment, on the latter showing that he had performed. The same rule applies as between Davis and H. Geer's assignees, the *material men*. The statute confers on them a right to demand payment out of any arrears of the contractor, due from the owner when the account is served, or accruing afterward. (*Vide act of 1830, § 1, 4.*)

*Haswell v. Goodchild*, (12 *Wendell*, 373,) is not incompatible with the rule mentioned as to the *onus probandi*. In that case, the extra work was paid for; and though other work was shown to have been done, the evidence was quite equivocal whether it was in fulfilment of any written contract; or if it were, no written contract was produced or shown, to fix the time of payment under it. The decision went on the circumstances; but it never can be received as repudiating the well established rule, that when you show work done under a contract, and all the days of payment past, it throws the *onus* of proving actual payment on the employer. Such is the case before us.

Judgment reversed.

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Jermaine v. Waggener.

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## JERMAINE vs. WAGGENER and another.

The canal commissioners, under the act for the construction of the Crooked Lake Canal, caused surveys, &c. to be made and then adopted a plan, as required by the act, preliminary to commencing the work ; but the plan had no reference to the defendants' dam, then standing at the outlet of the lake. Afterward, however, the commissioners, by way of substitute for a portion of the machinery contemplated by the plan, permitted the defendants to increase the height of their dam ; which being done, caused an injury to the plaintiff's lands lying above, greater than would have resulted had the plan been pursued: *Held*, that the alleged authority from the commissioners constituted no protection to the defendants, against the plaintiff's claim for damages.

The powers conferred on the commissioners, in respect to the adoption of the plan mentioned, were *quasi* judicial ; and having once passed upon the question, and determined what the plan should be, their jurisdiction in that particular was at an end.

*Semble*, had the act stopped with a general authority to the commissioners to construct and complete the canal, their power to authorize the raising of the dam in question at any stage of the work, might have been implied ; and they having adjudged it necessary that the power should be exercised, and given the defendants authority to execute it, the latter would have been protected.

But the commissioners' power being restricted to the adoption of a plan before commencing the work, and having been exercised accordingly, any departure from the plan fixed upon, injuriously affecting a third person, forms a ground for the recovery of damages.

The rule, protecting one for acts done by him under the direction of a judicial body, *prima facie* authorized to give the direction, does not apply, where the jurisdiction of those giving the direction is limited to a *single act*, and has become *functus officio* by its performance.

It is different in respect to magistrates or commissioners, having power to act on certain questions of property as they accidentally arise, in the form of litigation, assessment, &c. ; for their agency is general.

*Semble*, that a mere volunteer in the execution of an order or process, not legally *compellable* to perform that duty under any circumstances, is responsible even for latent jurisdictional defects.

*Held*, that the raising of the dam in question could not be defended on the presumption that it was done pursuant to 1 R. S. 206, §§ 17 and 18, 2d ed. relating to *extraordinary repairs* ; as an application for that purpose, and an adjudication thereon by the canal board, did not appear to have been made, and are not to be presumed.

Nor was it defensible as a necessary act of *ordinary repair*, within 1 R. S. 203, § 32, *subd.* 2.

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CASE for raising the defendants' dam, so as to flow the plaintiff's lands lying along the margin and inlet of Crooked Lake. The cause was tried before MONELL, C. Judge, at the Steuben circuit, 1839.

In 1830, the plaintiff purchased and took possession of two parcels of land, one containing 30 acres, bounded on the inlet of the lake; and the other containing 36 acres, bounded on the lake and inlet. Of these he had remained in possession ever since. In the same year, the plaintiff purchased another parcel of land containing 340 acres, bounded on the lake and inlet, the general possession to be given in May, 1835; but he was to have immediate possession of part, for the purpose of cutting a ditch and making a road near the beach of the lake. The plaintiff acquired the general possession of the 340 acre parcel, in 1835, according to the contract. The action was for an injury to all these lands, while the plaintiff had possession; and to the ditch on the 340 acres, before he came to the general possession of that parcel.

The defendants' dam was on the outlet of Crooked Lake. The state of this dam, its influence on the lake, and the manner in which it had affected the land in question, were topics of inquiry on the trial; the evidence thereon ranged from 1812, down to 1839.

It appeared that in March, 1834, the defendants added ten inches to the height of their dam. This they did by permission from the canal commissioners, and other state agents, with a view, as alleged, thereby to aid in regulating the waters of the Crooked Lake Canal.

The act authorizing the construction of that canal, was passed April 11th, 1829. (1 R. S. 234, 2d ed.) Shortly after its passage, Mr. Hutchinson, an engineer, under the direction of the canal commissioners, and pursuant to the act, devised a plan of the proposed work. By this plan, the lake was to be made a reservoir by a state dam at the outlet, about 150 feet above the defendants' dam, and the water detained, when necessary, by means of regulating gates, of such a width as to make the top water line 6½

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feet above the canal bottom. The permanent part of the dam was to be made  $8\frac{1}{2}$  feet above the bottom of the canal ; and on that, the contemplated gates were to be hung : The work to be so constructed that, when the water arrived at the top water line, the gates could be used to permit the surplus water to pass off. This plan was adopted, and the state dam built ; but the gates were not then constructed. It had, however, no reference to the defendants' dam, as regu'ating the water for the use of the canal. Mr. Hutchinson, who was a witness, after detailing the original plan, said, he made his first surveys in 1829, and the canal was put in operation in 1833. He gave it as his opinion, that the waste gates were sufficient to control and discharge the flood waters of the lake, if properly managed. The raising of the defendants' dam in March, 1834, was intended as a substitute for the regulating gates contemplated by the above mentioned plan.

In 1836, the gates were erected ; but the defendants continued the same addition to the height of their dam after that time, claiming the right to do so, under their original authority. Evidence was given tending to show, that the defendants' dam, thus raised, flowed the plaintiff's lands, especially in high water, much more than the regulating gates would have done, if managed according to the original plan.

The plaintiff insisted, that the alleged authority to raise the dam, derived from the state agents, being a departure from the plan already adopted, was void ; and afforded no protection to the defendants, as to any portion of the damages consequent thereon.

The judge charged the jury, among other things, that by the statute of 1829, the canal commissioners were to make a plan and ascertain whether the work could be accomplished at a given expense ; and settle all claims for damages. That the plan had not been pursued. That the commissioners having departed from it, their permission to the defendants to raise their dam to the top water line, as established in that plan, and their raising it accordingly, could



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furnish no protection as against a citizen injured by the act.

The counsel for the defendants requested the judge to charge, that the original plan having established a top water line, the defendants had a right to raise their dam to that; though the order to raise it might not afford them any protection. The judge declined so to charge. Verdict for the plaintiff, \$930 damages. The defendants now move for a new trial, on a case.

*J. Taylor*, for defendants.

*B. D. Noxon & S. Stevens*, for plaintiff.

*By the Court*, COWEN, J. Clearly, this is not a case for our interference with the verdict because it was contrary to the weight of evidence, either on the question whether any injury was done, or on the right supposed to have been acquired by adverse enjoyment, or on the amount of damages recovered. Nor is there any serious question arising upon the judge's admission or rejection of evidence.

The objection to the judge's charge raises a point of more difficulty. Had the statute of 1829, stopped with a general authority to construct and complete the canal, the power to authorize the raising of any dam in the outlet, at any stage of the work, would have been implied. The adjudication of the canal commissioners, that the ten inch addition to the defendants' dam was necessary to raise the reservoir with a view to an adequate supply of water, would, in such case, have been valid. The defendants would, therefore, have been protected, as having acted under the authority of a court possessing competent jurisdiction over the subject matter; for there is no pretence that they have raised their dam higher than the canal commissioners directed them to go. I take it for granted that the alleged permission was given, because, although the evidence to this fact was not all that way, yet the decided balance of it was, and the judge assumed in his charge that the per

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mission was sufficiently established. Then, by repudiating it as beyond the commissioners' jurisdiction, he let in a claim for damages on that ground, which doubtless entered into the verdict, in part at least, whatever the jury may have thought as to the effect of the dam, or the right to build and maintain it at the former height, independently of state authority.

But the statute did not leave the canal commissioners to act under a general and unrestricted power. By the second section, (1 *R. S.* 234, 2d. ed.,) they were required to cause an examination, surveys, levels and estimates to be made, to ascertain whether an adequate supply of water could be obtained without injuriously affecting the hydraulic works on the outlet. This plan was to be, either by raising the water in the lake above high water mark, by constructing a dam across or near the outlet, or by deepening the channel, &c. or upon any other approved plan. Then, by the third and subsequent sections, if, by the examination, &c. it should be ascertained to their satisfaction that a plan could be adopted which should work no injury to the hydraulic works, they were to pursue it in the construction of their work; but not unless the owners of the hydraulic works below should release all claim to damages, or the damages should be first assessed and paid, or tendered. And in no event was the work to be commenced, unless security should be first given to construct the canal for a sum not exceeding \$120,000.

In executing this authority, the commissioners adopted Mr. Hutchinson's plan, after he, as their engineer, had examined, surveyed, taken the proper levels and made the proper estimates, in the language of the act. This plan comprehended a top water level, to be secured by means of the state dam connected with regulating gates, the whole being entirely independent of, and not at all looking to the defendants' dam below. The canal was then constructed, and put in operation upon that plan. The regulating gates were not actually erected till after the act of May 11, 1835, (1 *R. S.* 326, 2d ed.) By this act, some additional

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powers were conferred upon the commissioners, but none which affect the question between these parties. In the meantime permission was given by the commissioners, for the defendants to raise their dam as a substitute for the gates of the original plan; and it can hardly be disputed, that it proved considerably more injurious to the plaintiff than those gates would have been. For the injury thus occasioned, he had a right to demand damages, unless a power remained in the commissioners to depart from the original plan. It has been impossible for me to perceive any rule of construction under which such a power can be claimed. The statute expressly directed them to procure and adopt a plan, preliminary to the commencement of the work. It had reference not only to the expense of the work, but especially to the manner in which the flow of the water might be modified. The height to which the water was to be raised, and the manner in which it was to be regulated, was a most material object of inquiry in fixing on a plan, not only in reference to the works below, but the interests of proprietors above the state dam. And any departure from it, even in the structure of the state dam, injuriously affecting the citizen, would form a ground for the recovery of damages. *A fortiori*, in directions given to raise another dam to which the plan had no reference whatever. The commissioners having once passed upon the question, their powers were at an end. These powers were *quasi* judicial. The adoption of a specific plan, was but another name for the rendition of a judgment by a court of limited jurisdiction. Such a step is in its nature irrevocable, and incapable of modification. Above all, should it be so holden, after it is acted upon, and purchases made, or other valuable interests acquired in reference to it. In this respect, the power under which the canal commissioners acted, resembles that of commissioners of highways or streets, relative to planning and laying out ways; only it is still more limited.

The more plausible suggestion certainly is, that the defendants were protected, because the canal commissioners

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had jurisdiction of the subject matter; and although the latter might not be protected, yet the defendants should be, inasmuch as they acted under the direction of a body which was, *prima facie*, authorized to give the direction. But that rule certainly cannot apply to a case where the judicial body is limited to a single act, and has become *functus officio* by its performance. Jurisdiction over the subject matter thus ceases, and must be regarded for all purposes as if it never existed. The case differs in more respects than one from that of an officer acting under an order or process emanating from a magistrate or commissioner having power to act on certain questions of property, as they may accidentally arise in the form of litigation, assessment, or the like. The state thus creates a general agent, for whose acts his inferior minister ought not to be held accountable, although the superior may have exceeded his power. It is otherwise of a special limited agency. But beside, I am not aware that the rule of protection in *Savacool v. Boughton*, (5 *Wendell*, 170,) and its kindred cases, has ever been extended to the inferior officer or agent, unless the order or process be such on its face as, if valid, he is compellable by law to execute. (*Vide Earl v. Camp*, 16 *Wendell*, 562.) I admit that it need not be in writing. If he be compellable to act under a parol order, he ought equally to be protected. But the defendants were not. They were mere volunteers, who might have taken time to inquire and satisfy themselves whether the power had been exhausted. (*Id.*) In *Painter v. The Liverpool New Glass & Coke Co.* (6 *Nev. & Mann.* 736,) Lord Denman, Ch. J. said: "If a third party chooses, for his own benefit and advantage, to interfere, and take upon himself to execute a writ, he must take care and see that it is a valid process."

But, it is said the canal commissioners had general power to direct as to *repairs*; and we are referred to 1 *R. S.* p. 206, § 17, 18, and p. 208, § 32, 2d ed. Sections seventeen and eighteen authorize the three acting commissioners to submit surveys, &c. and obtain leave of the canal

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board, to make extraordinary repairs or improvements. But that does not appear to have been done here; and we can no more presume an application to, and a judicial act of the canal board, than we could presume a suit and judgment rendered. Section thirty-two, subdivision three, authorizes the acting canal commissioner for the line to prosecute the work when such leave shall be obtained. That of course has no application. The same section, subdivision two, authorizes him to direct and cause to be made such *ordinary repairs* as he shall perceive to be necessary. But to call this ten inches addition to the defendants' dam, a *repair*, in any sense, would be straining the word altogether beyond its natural meaning. It was a completion of the measure for raising and maintaining the reservoir at its top water line, contrary to the original plan. A church is finished except the steeple; surely it would be a great departure from accuracy, to call the finishing of the work on the steeple, a repair.

But the addition to the dam does not rise above the top water line; and therefore, it is said, no mischief is done beyond what would accrue from the state work. That cannot be so. The addition was a permanent structure; whereas the gates, properly managed, have the capacity to accommodate themselves to the state of the water above, whether high or low, so that it shall not rise above the prescribed line. The complaint is, that the defendants' dam does its mischief mainly, perhaps entirely, by not yielding, or being capable of modification, in times of very high water. This is doubtless so; at least the jury were right in saying so on the evidence.

On the whole, we think the learned judge was right in his direction to the jury; and that a new trial must, therefore, be denied.

New trial denied.

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## CANAL BANK vs. BANK OF ALBANY.

The defendants, endorsees of a draft payable to B.'s order, received the same through several successive endorsements, B.'s name appearing as the first, and, as agents of their immediate endorser, but without disclosing their agency, presented it to the plaintiffs, by whom it was paid. The latter subsequently ascertained that the name of B. was a forgery; and having notified the defendants of this fact, sued to recover back their payment. *Held*, that though the defendants were innocent of any intended wrong, they had obtained money of the plaintiffs on an instrument to which they had no title, and were therefore bound to refund; and this, though notice of the forgery was not given till more than two months after they had received the money, and transmitted it to their principal.

*Held* also, that the payee was not disqualified by interest from being a witness for the plaintiffs.

None but the payee can assert any title to a bill or note payable to order, without his endorsement.

*Semble*, that if one accept a draft in the hands of a *bona fide* holder, he will not be allowed afterward to dispute the genuineness of the *drawer's* signature, though he may that of the *endorsers*; and *payment* operates, in this respect, the same as an *acceptance*.

Money paid by one party to another through a mutual mistake of facts, in respect to which both were equally bound to enquire, may be recovered back.

*Semble*, where a drawee of a draft has paid it to an innocent holder on the faith of a forged endorsement, mere lapse of time in the abstract, however long, between the payment and notice of the forgery, will not deprive him of his remedy over; provided he has incurred no unreasonable delay *after discovery of the forgery*.

Cases relating to the effect of delay in giving notice under these and similar circumstances, commented on, and some of them disapproved; especially *Cocks v. Masterman*, (9 Barn. & Cress. 902.)

Where several successive endorsees have advanced money on a draft payable to order, and it turns out that neither had title, by reason of the first endorsement being a forgery, each may recover from his immediate endorser.

A bank to which a draft is endorsed and sent for the purpose of collecting it as agent of the endorser, and which transacts the business without disclosing its agency, may be regarded and charged as principal by those with whom it thus deals. And it will be no answer, that it is the uniform custom of banks to transact such business without disclosing their agency.

**ASSUMPSIT**, to recover money paid on a draft, tried at the Albany circuit, in 1840, before CUSHMAN, C. Judge. The draft was drawn on the plaintiffs by the Montgomery Corn-

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ty Bank, payable to the order of E. Bentley, jun. It purported to have been endorsed successively by Bentley, then by one Budd, afterward by the Bank of New-York, and lastly by the defendants, to whom the plaintiffs paid it. The payment of it was made on the 28th of March, 1839. The ground on which the plaintiffs sought to recover back the money was, that the endorsement purporting to be that of Bentley was a forgery, which fact was proved by Bentley and others on the trial.

On the 7th of June, 1839, the plaintiffs' attorney called on the defendants, and asked to have the money refunded, notifying them at the same time of the forgery.

When the plaintiffs offered Bentley as a witness, the defendants objected, insisting that he was incompetent, as being interested. The objection was overruled, and Bentley permitted to testify; whereupon the defendants excepted.

The defendants offered to prove, and the plaintiffs admitted that they (defendants) received the draft from the Bank of New-York to collect, as agents for the latter, and that as such they received the money and paid it over to their principals, before notice of the forgery. The defendants, however, never disclosed their agency to the plaintiffs till called on by the plaintiffs' attorney, as above mentioned, and notified of the forgery.

The defendants further offered to show, a uniform custom of the banks of this state, to receive and collect drafts in the manner this was done, without disclosing their agency. The plaintiffs objected, on the ground of irrelevancy, and the judge overruled the offer, to which the defendants again excepted.

A verdict having been rendered for the plaintiffs, the defendants now moved for a new trial on a bill of exceptions, presenting the above, and some other points.

*S. Stevens*, for the defendants.

*J. Harris*, for the plaintiffs.

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*By the Court, COWEN, J* It is not perceived what advantage, direct or remote, Bentley can derive from the plaintiffs' recovery, nor what he can lose by their failure. It is said, the plaintiffs will hold the money to be recovered in trust for the witness. This is not so. Their recovery or failure will neither add to nor take from their liability to him. Their recovery will not, as the defendants' counsel supposes, estop them to deny that Bentley's name was forged. The record and proceedings here would not, *as such*, be any evidence whatever between him and the plaintiffs. The whole is but a more solemn admission of the forgery; and his being sworn as a witness, adds nothing to its strength in his favor. Should he sue the Montgomery County Bank, and should they plead payment, they would have the same right to contest the forgery as if this suit had never been; nor could any of the proceedings here be used as evidence against the witness, even though the plaintiffs should fail to establish the forgery against these defendants.

On the merits, there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent. (*Chit. on Bills*, 336, 7, *Am. ed. of 1839*.) And the act of payment could amount to no more. (*Id. id.*) Neither acceptance nor payment, at any time, nor under any circumstances, is an admission that the first, or any other endorser's name is genuine. (*Id.* 628.) In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money under the mistaken belief thus induced, that the name was genuine. To a note or bill payable to order, none but the payee can assert any title without the endorser.



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ment of such payee; not even a *bona fide* holder. (*Id.* 286 a, 430.) (a)

But it is said, the equities of the parties are equal, and the defendants having possession, must prevail. No doubt the parties were equally innocent in a moral point of view. The conduct of both was *bona fide*, and the negligence or rather misfortune of both the same. It was the duty, or, more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. For the very reason that the parties were equally innocent, the plaintiffs have the right to recover; and that was conceded throughout, in the authority cited on another point by the defendants' counsel. (*United States Bank v. Bank of Georgia*, 10 *Wheat.* 333, 354.) The whole course of argument and authority in that case, went on the fault of the party who paid the money. It was likened to the case of a bank paying a check, on which the name of the drawer was forged, which was again assimilated to the acceptance of a bill of exchange, where the drawer's name is forged. It was said that, in such cases, the payor or acceptor takes upon himself the knowledge of his correspondent's hand writing, and shall be concluded. Even that is going a great way, unless some *bona fide* holder has purchased the paper on the faith of such an act. But it is sufficient to distinguish the case, that it goes on the superior negligence of the party paying or accepting. At page 355, the court draw an express distinction between the effect of acceptance or payment as a recognition of the *drawer's*, and the *endorser's* hand writing. It is said, the forgery of an endorsement is not a fact which the acceptor is presumed to know. And perhaps the decision in the case cited, should be rested entirely on negligence in the bank of Georgia. (*Vid. id.* p 344; also the case

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(a) The same general doctrine has been recently held in Louisiana. (*Dick et al. v. Leverich*, 11 *Lou. R. (Curry)* 573.) And see *Talbot v. Bank of Rochester*, (*post*, p. 295.)

*of the Gloucester Bank v. The Salem Bank, 17 Mass. Rep 33, cited 10 Wheat. 350.)*

But, it is said, the plaintiffs here delayed giving notice of the forgery, from the 28th of March, till the 7th of June. Under what circumstances, is not disclosed ; for the point of delay was not made at the trial. That is a sufficient reason why it should not be listened to here. But I am not willing to concede, that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us. It is said, the defendants had endorsers behind them ; and by delay, they were prevented from charging them, by giving seasonable notice. Admit this to be so ; the plaintiffs did not stand in the relation of a holder. They were the drawees, and advanced the money by way of payment. They would never, therefore, think of notice to the defendants, till they accidentally discovered the forgery. If there had been any unreasonable delay after such discovery, another question would be presented. I infer from the rigor of the case cited by the defendants' counsel, (*Cocks v. Masterman, 9 Barn. & Cress. 902,*) that he would exact as great, indeed greater diligence in giving notice, than is necessary to fix an endorser. There, the plaintiffs had paid to the defendants, the holders, an acceptance, purporting to be in the name of the plaintiffs' customers. The bill was drawn payable at the plaintiffs' bank. The next day, discovering the forgery, they, on the same day, gave notice to the defendants and the endorsers. This was held too late. The court even declined to give an opinion, whether notice on the very day of payment would have entitled the plaintiffs to recover ; but held, that notice on the very day was at all events necessary, and that short of this, the plaintiffs were not entitled to recover. They said, the holder must not, by want of notice, be deprived of the right to take steps against the parties to the bill, on the very day when it was paid ; and they admitted that this was requiring one day increased diligence, beyond what would have been required in the ordinary case of dishonor. In the latter

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case, they allowed that notice on the next day would have been in season. In a previous case of payment under the like circumstances, notice having been given on the very day, the bankers who paid for their customers, were allowed to recover. (*Wilkinson v. Johnson*, 3 Barn. & Cress. 428.) In this earlier case, the payment was made for the honor of endorsers, whose bankers the plaintiffs were. Both cases were treated by the court, as standing on the same principles, though, in the latter case, they do not put it distinctly on any principle. In the earlier case, they said the plaintiffs were not the drawees, or acceptors, nor the agents of any supposed acceptors. The same thing may, I take it, be said of the latter case, though the plaintiffs assumed to pay for the acceptors. They could scarcely have intended to pay as mere agents for the acceptors, an act which would have extinguished the bill, and cut them off from a remedy against the drawers and endorsers. Where a bill or note is payable at a bank, and no express direction given by the principal to the bank, on its coming in with endorsers, the bank, of course, takes the paper as a purchaser, or holder; and for its own indemnity, presents it to the principal for payment, on the very day, or as soon as may be. Thus, there is a good chance to detect the forgery of his name; and hurry the notices to the other parties. Whatever forgeries there may be, are soon brought to light. In the earlier of the two cases cited, the court said, "the general rule of law is clear and not disputed, viz. that money paid under a mistake of facts, may be recovered back, as being paid without consideration." In the latter case, the court do not deny the rule, nor that it would apply to the case before them. But to enforce it, they require an almost impracticable diligence. I doubt whether this case can be sustained, except upon its own peculiar circumstances, if it can be sustained at all. In all the previous cases, where a recovery had been denied, there was carelessness, or delay, or both. *Smith v. Mercer*, (6 Taunt. 76.) was much like *Cocks v. Masterman*, and there had been a neglect to discover the forgery and give notice, for

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a week's time. The case of *Price v. Neale*, (3 Burr. 1354,) was one of palpable neglect, in both payment and delay. Some other cases turn on similar principles. (*Barber v. Gingell*, 3 Esp. Rep. 60. *United States Bank v. Bank of Georgia*, and *Gloucester Bank v. Salem Bank*, before cited. *Levy v. Bank of United States*, 1 Binn. 27. 4 Dall. 234, S. C.) If *Cocks v. Masterman* is to be followed, it must, I think, be on the same principle. The plaintiffs paid on the faith of their correspondents' name. The former were not named as drawees; but they had a superior knowledge of their correspondents' hand-writing, which they neglected to exert. It might, therefore, have been reasonable to require that they should overcome the objection of neglect, by such a speedy movement as to save all possible advantage to the holder, against the prior parties. But, where each party enjoys only the same chance of knowledge, no case demands any thing more than reasonable diligence in giving notice, after a discovery of the forgery. The common case of paying forged bank notes, is one instance. And navy and victualling bills, have been treated as standing on the same footing. (*Jones v. Ryde*, 5 Taunt. 488. *Bruce v. Bruce*, id. 495, note.) These are cases of transferring notes from one to another, which turn out to be unavailable by reason of a forgery, in respect to which both parties are equally ignorant, the one being no more guilty of neglect than the other; indeed, neither being negligent, but both being imposed upon under the exercise of ordinary diligence. At all events, it does not lie with the payor to complain of the very neglect imputable to himself. Neglect to give notice, after discovering the forgery, is another matter. (*Vid. Chit. on Bills*, Am. ed. of 1839, p. 463.) If the endorsers are to be charged, as such, why should not the accidental delay in discovering the forgery, on a paid bill especially, operate as an excuse for not giving them immediate notice?

The defendants did not disclose their agency, and must, therefore, as between them and the plaintiffs, be taken to have acted as principals. They obtained the money of

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the plaintiffs on a bill of exchange, payable to the order of Bentley, under a forged endorsement of his name. Money has been successively paid by mistake of the several endorsees, the plaintiffs, the defendants, the Bank of New-York, &c. and the remedy by each is plain. It is by action over, each against his respective endorser. The bill has never been put in a regular course of negotiation, for want of Bentley's name. No one who has advanced money on it, therefore, obtained what he supposed he had got; and the endorsers, beside being liable as such, may each be sued, as having received money without consideration.

The proof offered, relative to the custom of banks to collect paper received by them as agents, without communicating the name of their principal, would have disclosed a case in which it would be apparent that the defendants might or might not have been agents. The object of the proposed proof was, to supply the want of direct evidence, that notice of the agency had been given by them at the time. Till they had superadded proof of another custom, for banks never so to receive paper and collect as principals, the proposed evidence could have had no tendency to affect the plaintiffs with such notice. Knowledge that the defendants *might be* acting as agents, was not enough. This is so of every man ostensibly transacting business as a principal. (*Vid. Mills v. Hunt, 20 Wendell, 433.*) The proof offered and rejected was, therefore, irrelevant.

New trial denied.(a)

(a) See *Talbot v. Bank of Rochester*, post p. 295

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**TALBOT vs. BANK OF ROCHESTER.**

T., the owner of a certificate of deposit in the bank of L., payable to order, caused it to be endorsed with directions that it should be paid to W. & Co., and then transmitted it to them by mail, though without their knowledge or request. It never reached W. & Co., but was stolen on its way, and their names forged upon it; after which, it came to the defendants' hands in the ordinary course of business, who collected the money on it, supposing themselves to be the owners; *Held*, that T. had an election, either to sue the defendants in trover as for a conversion of the certificate, or to recover the amount in an action for money had and received.

And though the bank of L. had been guilty of laches in apprising the defendants of the forgery after the payment of the certificate; *held*, that this constituted no defence against T.'s claim, however the matter might stand as between the defendants and the bank.

Under such circumstances, a recovery and satisfaction in favor of T. against the defendants, would transfer the property in the certificate to the latter.

The owner of a certificate of deposit who endorses it payable to another, and sends it to him by mail, but without his knowledge, retains the property in it until the endorsee receives it.

**ASSUMPSIT**, for money had and received, tried before DAYTON, C. Judge, in the year 1840. The plaintiff's claim was for a sum of money received by the defendants from the Livingston County Bank, under the following circumstances: In July, 1838, the plaintiff enclosed in a letter directed to H. B. Washburn & Co., New-York, a certificate of deposit in the Livingston County Bank, of \$162,50, which he had purchased, and which was payable to the order of one John Kerr. When enclosed in a letter, it was regularly endorsed thus: "Pay H. B. Washburn & Co. (Signed,) John Kerr." H. B. Washburn & Co. had no knowledge of the transmission of the certificate to them, at the time, nor did it ever reach them; but on its way to New-York it was stolen, and their firm name forged upon it. It purported, when produced at the trial, to have been subsequently endorsed by J. Hinsdale, and then by Kempshall & Bush, who, on the 2d of August, 1838, delivered it to the defendants in the ordinary course of business, the latter passing it to their credit. Immo

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diately thereafter it was sent to the Livingston County Bank, by whom it was paid to the defendants. On the 25th of September, 1838, the Livingston County Bank apprised the defendants that the certificate had a forged endorsement upon it, which was the first and only notice of the fact they ever received. Before the commencement of this suit, the plaintiff had written the defendants, requesting payment of the amount of the certificate, but the latter declined paying.

The defendants moved for a nonsuit upon the following grounds, viz.: 1. That there was no such privity between the plaintiff and defendants, as entitled the former to maintain this suit: 2. That the title or property in the certificate was not in the plaintiff: 3. That there had been laches in giving notice of the forgery, &c.

The circuit judge overruled the motion, to which the defendants' counsel excepted; and a verdict having passed in favor of the plaintiff for the amount of the certificate and interest, the defendants now moved for a new trial on a bill of exceptions.

*S. Stevens*, for the defendants.

*J. R. Lawrence*, for the plaintiff.

*By the Court*, COWEN, J. The questions in this case depend on nearly the same principles with those in the *Canal Bank v. The Bank of Albany*, (*ante*, p. 287;) but some additional considerations arise.

1. It is entirely clear that the plaintiff might, (supposing the title not to have passed by his endorsement and putting the certificate in the post office,) have maintained trover against the defendants, for a conversion of the certificate; and they having procured the money upon it, the plaintiff thereby became entitled to bring this action for money had and received, at his election. This doctrine is quite familiar, and *Lamin v. Ware* (2 *Ld. Raym.* 1218.) is in point.

2. The merely putting of the letter in the post office, directed to H. B. Washburn & Co., though the certificate endorsed to them by the plaintiff was enclosed, did not pass any interest to them. They never received it; of course, never assented to the endorsement, and the transfer was therefore incomplete. The property of the certificate remained in the plaintiff. It was not mailed at the request, nor with the privity of Washburn & Co. The plaintiff retained the right to alter or strike out the endorsement.

3. It is said the plaintiff cannot recover, by reason of laches on his part; and the objection was, in this case, taken at the trial. Laches is charged on the Livingston County Bank, which, it is said, could not recover against the defendants; and it is insisted that their laches are imputable to, or operate to the prejudice of, the plaintiff. But even admitting that the Livingston County Bank, in order to a recovery by them, were bound to have given earlier notice, it is not perceived that the plaintiff must therefore suffer. That he might have recovered his money of that bank, is no reason why he should not have an action against the defendants. A man who tortiously takes a note from the holder, which is made by A., and obtains the money of A., is none the less liable to an action at the suit of the holder, because A. may have paid under circumstances which would entitle him to defend against an action by the wrongful taker. It is not pretended, that the plaintiff has been personally guilty of laches. His note was stolen on its way to New-York, and passed off by a forged endorsement, under circumstances which prevented any title passing, even to a *bona fide* purchaser of it. (*Chit. on Bills, Am. ed. of 1839, p. 337, and note. Id. 258, and 260. 6 Esp. R. 57. 2 Burr. 1216.*) He is in the same condition as if any chose in possession had been stolen from him and transferred to the defendant, who had converted it into money by sale to another. In such case, no one would doubt the plaintiff's right to an action for money had and received. A recovery and satisfaction in this suit, will transfer the property in the certificate to the defendants, by operation of law;



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and any injurious consequences to the latter, arising from supposed neglect in the Livingston County Bank, must be settled between the two banks. Beside, the defendants might, at any rate, if they had exerted the diligence which they now require of others, have had an immediate action against Kempshall & Bush, their own endorsers.

But if notice were necessary, it is far from being clear that it was not given as speedily as could reasonably be required, under the circumstances.

New trial denied

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THE PEOPLE vs. MEIGHAN and others.

A bond taken by a justice of the peace, in a prosecution for bastardy, containing, in addition to the provisions required by law, others, imposing further obligations on the obligor, is void.

Accordingly, where M., being arrested on a charge of bastardy in a county other than the one where the warrant issued, entered into bond, conditioned to "indemnify any town," &c. (as provided by 1 R. S. 650, § 8, 2d ed.,) and also, to "*pay the sums for the support of the bastard and the sustenance of its mother, as the same is ordered by J. I. B. (the justice who issued the warrant,) and such other justice as shall associate with him, or as shall be ordered by the court of general sessions,*" &c.: HELD, an unauthorized bond, taken *colore officii*, and therefore void *in toto*.

*Quere*, whether, independent of the statute against unauthorized bonds, &c. taken *colore officii*, the bond in this case might not have been upheld.

DEMURRER to a declaration on a bastardy bond. The declaration recited a warrant issued by J. I. Borst, a justice of Schoharie county, against Meighan, on oath there made, charging him with being the father of a bastard child; which oath was made by Anna Vrooman, a resident in that county; that the warrant was endorsed by John O. Cole, a justice of Albany, and Meighan arrested in the county of Albany; that he was brought before said Cole, and there entered into the bond in question, the other defendants signing as his sureties. The bond, on oyer, appeared to be conditioned, that Meighan should "pay the sums for the support of the said bastard, and the sustenance of its mother, as the same is ordered by the said Joseph I. Borst and such

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other justice as shall be associated with him for that purpose, or as shall, at any time hereafter, be ordered by the court of general sessions of the peace of said county of Schoharie; and shall fully and amply indemnify the said town, and every other county, town or city, which may have incurred any expense for the support of said child or its mother, during her confinement or recovery therefrom, against all such expenses; and shall pay the costs of apprehending the said John Meighan, and of any order of filiation that may be made," &c.

The defendants demurred, and the plaintiffs joined in demurrer.

*S. Stevens*, for defendants.

*A. C. Paige*, for plaintiffs.

*By the Court*, COWEN, J. On the case recited in the declaration, the only bond which the justice had authority to exact, is prescribed by 1 *R. S.* 650, 2d ed. § 8. And Meighan not choosing to appear at the sessions, and contest his liability, the condition of the bond is by that section limited to that part of the condition here, which provides for an indemnity to the county, &c. The preceding terms of the condition purport to impose a positive and unqualified obligation, to pay any sum of money which might be ordered by the special session or general sessions mentioned. This was a material addition, which might prove much more onerous than the condition required by the section. The latter is generally to indemnify, &c. which may be by providing for the child, under some mutual arrangement, or in some other way. The former leaves but one mode; the payment of the money to be ordered. At the common law, we might have saved the good, while we rejected the bad part of the bond: or, perhaps it might have been valid for the whole. Of this it is not necessary to inquire; for the 2 *R. S.* 214, § 60, 2d ed., absolutely destroys all and every part of any bond, taken by any officer by color of his office,

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in any other case or manner than such as are provided by law. By § 8, which I before cited, the justice is *to take* a bond in a certain form, which, in this instance, he materially departed from. It was taken *by color of his office*. In short, it is within the very words of § 60 above cited, which nullifies it; and there must be judgment for defendants.

Judgment for defendants.

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 FORD vs. NILES.
 

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One of the plaintiff's witnesses in an action of slander left court without his consent, and did not return until all the other witnesses on both sides had given in their testimony. He was then offered by the plaintiff to prove slanderous words laid in the declaration, other than those before attempted to be proved, but the circuit judge refused to allow him to testify. *Held*, that it was *discretionary* with the circuit judge to admit the witness or not, and that this court could not interfere to regulate the exercise of his authority.

Regularly, the party entitled to begin, at the circuit, must exhaust all the testimony in support of his side of the issue, before the opposite party is heard; and can introduce no evidence afterwards, save in reply.

The circuit judge, however, may, in his discretion, allow a departure from this rule; but the party cannot claim that he shall do so, as a matter of right.

SLANDER, tried at the Delaware circuit, in June, 1840, before CUSHMAN, C. Judge. A verdict was rendered for the defendant; and the plaintiff now moves for a new trial, on a case. The facts are sufficiently stated in the opinion of the court.

S. C. Johnson, for the plaintiff.

A. J. Parker, for the defendant.

*By the Court*, COWEN, J. One of the plaintiff's witnesses, not expecting the cause to be called till the next day, had left the place of trial, and gone a mile or two, to stay over night. The cause was called for trial in the eve-

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ning, and the plaintiff proceeded with his proof of the slanderous words, and rested. The defendant then went through with his testimony and rested, when the absent witness returned, and was offered by the plaintiff's counsel to prove the speaking of slanderous words laid in the declaration, other than those which he had before attempted to make out by his previous witnesses, and which had been spoken at different times. He also offered to show, that the witness had been absent without the plaintiff's consent. But the judge refused to hear the explanation, or receive the evidence, remarking, that the testimony on that point had closed.

Clearly, the judge had discretion in this matter, with which we cannot interfere. A witness chooses, of his own head, to disobey the process of the court; and on his return after the time at which he can be regularly called, the plaintiff claims to begin his proof *de novo*, on a distinct branch of his case, to be followed, of course, by answering evidence, and other evidence in reply, according to the nature of the issue. Once take away the discretion of the judge in a case like this, and the order of evidence, the time at which it shall be introduced, and the portion which shall be introduced at any given stage, will be put under the control of the witnesses. Where they happen to be numerous, they may drive the judge and jury to the round of evidence mentioned, several times, making the labor of trying a single cause, equal to that of many. It will not do for the party to say, his witnesses left him without his consent. Receive that as an excuse, and the discretion is vested in them. At this rate, the trial may, at their pleasure, be protracted to an intolerable extent. Judges and juries will be made the mere waiters upon careless or perverse witnesses; and the business of the circuits can never be done.

Regularly, the party entitled to begin, must exhaust all his testimony in support of the issue on his side, before the opposite testimony has been heard. He can afterwards introduce evidence in reply only. The judge often, for some

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peculiar reason satisfactory to himself, departs from this strictness; but the party can never claim that he should do so, as a matter of right. We cannot, therefore, control his course. He may grant or withhold the required indulgence, in his discretion.

New trial denied.(a)

(a) See *Cowen & Hill's Notes to 1 Phil. Ev.* p. 479, *et seq.* Also *id.* 710, 711, *et seq.*; together with *The Philadelphia and Trenton Rail-Road Co. v. Stimpson* (14 *Peters' R.* 448, 9.)

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 ASH & ANNERS vs. PUTNAM.

A member of an insolvent partnership at Syracuse, consisting of two persons, purchased goods in Philadelphia on the credit of the firm, under a misrepresentation of its circumstances. The goods were forwarded to Syracuse, but before they arrived, the partner not privy to the purchase, apprised the vendors by letter, of the insolvency of the firm, and, among other things, declared the goods subject to their order. The vendors, thereupon, took immediate steps to reclaim the goods, and actually succeeded as to a part: The residue, however, before the vendors found them, were seized and sold by the sheriff of Schenectada, while lying in a ware house at that place. In an action by the vendors against the sheriff, *held*, that the case should have been submitted to the jury on the question, whether there was such fraud in the purchase as avoided the sale; and a new trial was granted, because the circuit judge nonsuited the plaintiffs.

A purchase of goods with a preconceived design not to pay for them, is such a fraud as will avoid the sale.

Where a sale of goods is procured by fraud, the vendor still retains his legal right in them, unless, after discovering the fraud, he assent to the act of sale, either positively, or by such delay in reclaiming the goods as authorizes the inference of an assent.

As a general rule, a vendee of goods who, by reason of fraud in the purchase, has acquired no title as against the vendor, can convey none. An exception, however, is recognized by *Mowrey v. Walsh*, (8 *Cowen's Rep.* 238,) in favor of the title of subsequent *bona fide* purchasers.

Whether this exception would be sustained, were the question now *res nova*, is doubtful.

The doctrine of *Mowrey v. Walsh* examined, and various cases in relation to it cited and reviewed.

*Semble*, a sale procured by fraud does not divest the possession as between vendor and vendee, so as to deprive the former of his right to bring trespass, &c.

A sheriff, who, in virtue of an execution against a fraudulent vendee of goods

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and without notice of the fraud, seizes and sells them to *bona fide* purchasers, is not within the exception established by *Mowrey v. Walsh*, but is liable in trespass at the suit of the vendor.

*Quere*, whether purchasers under the sheriff would be protected, were the vendor to sue them.

The act of *stoppage in transitu*, is, in its nature, adverse to the vendee; and the doctrine on that subject does not apply, where the vendor and vendee *are agreed* that the property shall be reclaimed; for it is then a question of re-conveyance or rescission.

Where one of two partners purchased goods without the privity of his copartner, and the latter, on learning the fact, proposed by letter that the vendors should have the goods again, which proposal was accepted before the goods had reached the vendees; *held*, that the sale was thereby rescinded, and the goods could not be subsequently seized in virtue of an execution against the vendees.

**TRESPASS *de bonis*, &c.** tried at the Schenectady circuit, October 15th, 1838, before CUSHMAN, C. Judge. The action was against the sheriff of Schenectady, for seizing three boxes of books, under a *fi. fa.* against Alfred Dawmas and A. T. Raoul.

Dawmas purchased these boxes, with three other boxes of books, in November, 1836, of the plaintiffs, who were merchants in Philadelphia.

The purchase was made by Dawmas, as a member of the then insolvent firm of A. Dawmas & Co., Syracuse, (New-York,) consisting of Dawmas and Mrs. A. S. Raoul.

The books were purchased by Dawmas under a misrepresentation of the circumstances of the firm, on a credit of six months and soon after forwarded on their way to Syracuse, directed to A. Dawmas & Co. there; the plaintiffs, at the same, forwarding an invoice, mailed November 27, 1836.

Some days after, the plaintiffs received a letter from Mrs. Raoul, dated Syracuse, December 28, 1836, informing them of the insolvency of the firm; that the goods were then, probably, some where between New-York and Albany; and declaring them "at your (the plaintiffs') orders, to dispose of as you list."

On the 27th February, 1837, the plaintiffs wrote to Mr. O'Hara, at Albany, requesting him to detain the six boxes, if yet there. He failed to find them, except one small box;

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and so informed the plaintiffs by letter of March 5th, 1837. He also informed the plaintiffs, by this letter, that the small box was detained for them.

Previously, and on the 3d of January, 1837, the plaintiffs had written to Mrs. Raoul to return the invoice, and send them an order for the books, which she did on the 17th of the same month; and the plaintiffs received the invoice and order, January 19th. They afterwards recovered three of the boxes.

The books were purchased without Mrs. Raoul's assent, and Dawmas absconded soon after the purchase. The firm of A Dawmas & Co. was dissolved in the fall of 1836.

On the way to Syracuse, the three boxes in question reached a warehouse in Schenectady, where they were levied upon by the defendant, in virtue of the *fi. fa.* aforesaid, March 22d, 1837; and the books were afterward sold. Subsequently, Ash, one of the plaintiffs, came to Schenectady, and gave notice of his claim to the defendant.

On the plaintiffs' resting, the defendant's counsel moved for a nonsuit, insisting that the sale of the goods was absolute, vesting both possession and title in the vendees; that, though the plaintiffs had the right to stop the goods *in transitu*, by reason of the vendees' insolvency, (a right depending on an equitable lien,) yet, to reinvest themselves with the right of property and possession, they were bound to take corporal possession of the goods, or show notice to the carrier or warehouse-man not to deliver them, or to the defendant not to sell them, or some other equivalent act. That the plaintiffs not having done so, till after the sale of the goods under the execution, and the *bona fide* purchasers having parted with their money, the plaintiffs were concluded. That the acts of the plaintiffs, between them and third persons, were no notice to the defendants, nor an exercise of the right of *stoppage in transitu*, so far as the defendant was concerned.

The counsel for the plaintiffs insisted, that the goods were obtained from them fraudulently, which avoided the sale; and that this question should be submitted to the ju-

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ry. That the property in the goods never passed by the sale. But if it did pass, the goods were, previous to the levy, reconveyed to the plaintiffs; or the property in them had, before the levy, become revested in the plaintiffs, by an exercise of their right to stop them *in transitu*.

The judge refused to submit the evidence to the jury; but nonsuited the plaintiffs, who, by their counsel, excepted, and now move for a new trial upon a bill of exceptions.

A. C. Paige, for the plaintiffs.

S. Stevens, for the defendants.

*By the Court*, COWEN, J. Dawmas held his firm out to the plaintiffs as of ability to pay, when he probably knew it to be insolvent. A purchase, with intent not to pay, is such a fraud as will avoid the sale, (*Bristol v. Wilsmore*, 1 Barn. & Cress. 514; *Kilby v. Wilson*, Ry. & Mood. N. P. Rep. 178, 181;) and if the plaintiffs had a right to set up the fraud as against the defendant, the question should have been submitted to the jury.

When a sale is procured by fraud, no title passes to the vendee. (*Root v. French*, 13 Wendell, 570.) The vendor still retains his legal right in the goods, unless, after discovering the fraud, he assent to and ratify the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent. Either will, in connection with the original transaction, be deemed equivalent to a subsequent independent act of sale. But, in the case at bar, the goods were immediately reclaimed; and if the sale were fraudulent, the legal right remained in the vendors, the same as if the goods had been tortiously taken from them, without color or pretence of a sale. It is said in *Root v. French*, to be a general rule, that a person who has no title to property, can convey none; but it is but as an exception, that a third person may acquire a good title from a fraudulent vendee, by giving him value for the



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property, or incurring some responsibility upon the credit of it, without notice of the fraud. Such an exception was established in *Mowrey v. Walsh*, (8 Cowen, 238.) How that would now be treated, were the matter *res nova*, might perhaps admit of doubt. It is conceded, even in *Mowrey v. Walsh*, that the fraudulent purchaser obtains no title, and to this, *Bristol v. Wilmore*, (1 Barn. & Cress. 514,) is cited as in point. The right of the *bona fide* purchaser from him, is put on a superior *equity*. This is the only instance, I suspect, if we except *Parker v. Patrick*, (5 T. R. 175,) in which a supervening equity has been allowed to overcome a legal right to a chose in possession; and the latter may now be considered as overruled in England. (*Peer v. Humphrey*, 2 Adolph. & Ellis, 495. 4 Nev. & Man. 430.) The doctrine is vindicated in *Root v. French*, on its analogy to the *bona fide* purchase of a bill of exchange. But that rests on a notion peculiar to commercial law. Such a purchase passes the interest in the bill, even though it were stolen, or otherwise tortiously obtained. *Mowrey v. Walsh* has been followed in Massachusetts, (*Rowley v. Bigelow*, 12 Pick. 307,) and, for aught I know, in other states; but applying its principle to sales of choses in possession generally, would substitute the exception for the rule. Nor am I, by any means, prepared to admit, what was said in *M'Carty v. Vickery*, (12 John. Rep. 348,) that a sale, procured by fraud, even divests the possession, so as to deprive the vendor of his action of trespass or replevin. I do not admit, that, as there said, the sale changes the property. It remains in the vendor; and nothing is better settled, as a general rule, than that the absolute property-man retains the constructive possession, which is sufficient to sustain an action of trespass. (*Thorp v. Burling*, 11 John. Rep. 285. *Putnam v. Wiley*, 8 id. 433. *Aikin v. Buck*, 1 Wend. 466. *Root v. Chandler*, 10 id. 110.) "The universal and fundamental principle of our law of personal property," says Verplanck, senator, (*Saltus v. Everett*, 20 Wend. 275,) "is, that no man can be divested of his property without his own consent; and,

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consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor." And it appears to me the learned senator is right in setting down *Mowrey v. Walsh*, with its kindred cases, as furnishing the solitary exception—the single instance in which our law divests the title to a chose in possession without the owner's consent or default. (*Vid. also Hoffman v. Carow*, 22 *Wendell*, 318.) *Mowrey v. Walsh* is an anomaly; for there is no general principle in the law, that the equity of a *bona fide* purchaser from one destitute of title, shall overrule the prior legal right of the owner. To say that he is in fault, by parting with the possession—and therefore, of the two innocent men, he ought to suffer—would authorize any one to purchase even from a bailee. But such is not the rule. It is the contrary, viz. that, as between two equally innocent persons claiming either a legal or equitable right, his right which is prior in time, shall prevail. Beside, it is not true of one who has been fraudulently led to part with his possession, that this is his fault. It is but his misfortune. The rule that, of two innocent persons, he who has parted with the possession of his property must yield to a *bona fide* purchaser from the man to whom such possession is confided, has hardly ever been applied, except when the owner either transferred the legal title with the possession, reserving or raising a trust, or furnished such unequivocal *indicia* of absolute ownership with the possession as to mislead the purchaser. The latter advancing his money, and taking without notice of the trust, or in confidence of appearances, shall then hold. In the first case, the legal right is allowed to prevail against the equitable; and in the latter, the original owner is estopped to gainsay the language held by the *indicia* of ownership. In the first, the legal right is allowed to override the lurking equity; in the latter, the owner is himself forbidden to practice a fraud.

The right of the plaintiffs, therefore, being clearly established by the general doctrine of the law, it behooved the defendant to bring himself, at least within the excep-

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tion recognized by *Mowrey v. Walsh*, which we do not intend to question so far as it applies to the case of a *bona fide* purchaser. It is supposed that he did bring himself within that exception, by proving that he sold the goods to *bona fide* purchasers. However that might be if these purchasers were defendants, it is a sufficient answer that this action is against the sheriff, and not against his vendees. And *Mowrey v. Walsh* itself concedes, that a man who purchases goods with intent never to pay for them, acquires no such right as the sheriff can take in execution against him. Such was the exact point in *Bristol v. Wilsmore*. Such, too, was *Tamplin v. Eddy*, cited in a note to *Mowrey v. Walsh*. It is said that, in both the sheriff had notice of the fraud before he sold. But no adjudged case makes that distinction in his favor. *Mowrey v. Walsh* comes short of it; because, if that case be maintained at all, it can only rest on the idea of protection, personal to some purchaser, who makes an actual advance on the credit of the goods without notice. It is not necessary to say, whether the purchasers at the sheriff's sale come within the protection afforded by that case. If they do, it imparts none to the sheriff. No doubt he acted in moral good faith; but this never has been received as his protection for seizing the goods of one man under an execution against another. In *Bristol v. Wilsmore*, Abbott, Ch. J. said, a purchase of goods with a pre-conceived design of not paying for them, would vitiate the sale, and prevent the property from passing. (*Vid. also Stephenson v. Hart*, 4 Bing. 476.) And in *Root v. French*, Savage, Ch. J. speaks according to both principle and authority when he says—"A fraudulent purchaser of goods acquires no title as against the vendor, and has no interest which can be seized on execution." (*Allison v. Matthieu*, 3 John. 238. *Van Kleeef v. Fleet*, 15 id. 151. *Buffington v. Gerrish*, 15 Mass. Rcp. 156, 7, 8. *Abbotts v. Barry*, 5 Moore, 98, 102, *Dallas*, Ch. J.) The case of *Buffington v. Gerrish* intimates a distinction between the sheriff levying, and persons who purchase *bona fide* at the sheriff's sale. To

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say that the protection of the latter, however, even if admissible should operate *ex post facto*, so as to purge the conceded wrong of the sheriff, would, I suspect, be treading on ground entirely new.

My conclusion, therefore, is, that the case was not such as to shut out the question of fraud; and that this should have been submitted to the jury.

Other views were presented at the trial, assuming that the jury might find against the charge of fraud. One of these was that, before the levy, enough was done under the head of *stoppage in transitu*, to take away the sheriff's right. I doubt whether such a head belongs to the case. The measure of *stoppage in transitu*, is adverse to the vendee; (*Long on Sales*, 325, *Am. ed. of 1839*;) whereas, in the case at bar, the vendors' acts of reclamation were all done in concert with the vendees, or rather with Mrs. Raoul, one of the vendees, who must be taken as the representative of both. This supersedes the necessity of inquiring whether the vendors' acts were equivalent to an actual stoppage, or whether, if they were, they could avail as such, against the levy and sale.

But the question of re-conveyance, or rescission, does arise; and we are of opinion that a rescission of the sale, valid as against the defendant, was clearly established by the proof. Mrs. Raoul's letter and order for the goods in favor of the plaintiffs, were not only written and sent, but actually received by the plaintiffs, before the levy was made; and one, if not more, of the boxes belonging to the parcel sold, was probably detained in pursuance of the order. But independently of such actual detention of any part of the goods, the letter and order of Mrs. Raoul, and the actual acceptance of her proposition by the plaintiffs, of all which there is no dispute, themselves worked a complete rescission of the contract. That this is so, may be seen by the case of *Atkin v. Barwick*, (1 *Strange*, 165,) which decides even considerably more than is necessary for the present plaintiffs. In that case, the goods sold and sent by the vendors actually reached the hands of the ven-

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dees; but the latter being satisfied they could not pay, delivered them to one Penhallow, to be redelivered to the vendors. Shortly after the delivery to Penhallow, the vendees wrote to their vendors, stating their inability, and expressing an unwillingness that the goods should go to pay their creditors. This letter was sent two days after they had become bankrupts; though the goods had been received and delivered to Penhallow some time before. *Non constat*, but Penhallow was a mere stranger to the vendors, and not their agent; and they got no notice of the delivery to him, till after the vendees' bankruptcy. They then assented. All the judges held that the property in the goods passed back to the vendors, from the time when they were delivered to Penhallow, subject to the dissent of the vendors; the debt due from the vendees for the goods being a sufficient consideration. This case is stated and much commented upon by Mr. Lawes, in his *Treatise on Charter Parties and Stoppage in Transitu*, (p. 544.) The result of his remarks is, that the case had been often questioned as to its reasons and extent, but never had been overruled; nor had it ever been denied that, from the time of the notice reaching the vendors, and their assent, there was either a complete resale, or rescission, or refusal by the vendees to accept. Call it which you please, the effect is the same. In one case the property of the goods is revested in the vendors; in the other, it never was divested. And it has long been positively settled, that the vendee's consent to restore the goods, and the vendors' consent to receive them, revest the property in the vendors so as to avoid the effect of any subsequent seizure at the suit of creditors. (*Lawes, ut supra*, 550.) This, and even more, was distinctly held in *Salte v. Field*, (5 T. R. 211.) Indeed, all the judges there cite and approve the case of *Atkin v. Barwick*. In England perhaps, a doubt of these cases might be raised on the statutes of bankruptcy, which, in their spirit, are adverse to a preference among creditors. (2 *Kent's Comm.* 551, 3d ed. *Lawes, ut supra*, 549.) But no such principle exists here.

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There must be a new trial, therefore, for the purpose of submitting the question of fraud to the jury, and giving effect to the rescission, provided the proof shall be, on the new trial, as it stands now upon the bill of exceptions.

New trial granted.

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CARY and another vs. SAMUEL HOTAILING and WILLIAM HOTAILING.

A sale and delivery of goods, procured through a false representation of the vendee in regard to his solvency and credit, passes no title as between the parties; and the vendor may maintain either trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, to recover their value.

So, *it seems*, of a sale to a vendee, purchasing with a preconceived design not to pay.

Under such circumstances, the general and absolute ownership remaining in the vendor, not only the original interference with the property on the part of the vendee, but any subsequent acts of ownership by him, may be treated as an unlawful or tortious taking.

The general owner of personal property holds the constructive possession, and may maintain trespass, though the actual possession be in another.

A fraudulent vendee of goods may be charged in assumpsit for the price, or as a trespasser, at the election of the injured party.

Contracts of sale, procured through fraud, are not always valid, *it seems*, even as in favor of *bona fide* purchasers.

One who obtains the bailment of goods, fraudulently intending to deprive the owner of his property, may be convicted of larceny, under an indictment alleging that he feloniously stole, took and carried away the property, &c.

But if the transaction is made to assume the form of a sale, unless it comes within the statute as to false pretences, the fraudulent vendee is shielded from the charge of *taking*, in a criminal sense, though it is otherwise in respect to the *civil* remedy.

A sale of goods, procured through the fraud of the vendee, is equally void as between the parties, whether the fraud be in its nature indictable or not.

Where the question is, whether a vendee of goods procured the sale of them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may reasonably be supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*.

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REPLEVIN, for taking 75 barrels of flour, and 25 half barrels of beef-tongues, tried at the Albany circuit, June, 1839, before CUSHMAN, C. Judge.

The plea was *non-cepit*; and it appeared at the trial, that the plaintiffs, (who were provision dealers in Albany,) on the 30th of August, 1837, sold the flour and tongues to the defendants, partners and provision dealers, in the city of New-York. William Hotailing, one of the defendants, made the purchase at the plaintiff's store in Albany, and the articles were delivered to and shipped by him to his brother Samuel, the other defendant, who was then in New-York. Soon after their arrival, the defendants declared themselves to be insolvent; and having sold the property in question to *bona fide* purchasers, as was supposed, the plaintiffs brought this action to recover the value, on the ground that William obtained the goods by fraud.

The fraud was alleged to have consisted in William's falsely representing the solvency and credit of the defendants; and the plaintiffs, after giving in evidence various circumstances tending to establish it, offered Lyman Root as a witness, to show that William, the day before the plaintiffs' sale, made a purchase of him as agent for Olmstead and others, on similar representations which were false; but the offer was overruled, and the plaintiffs excepted.

The judge finally held, that to sustain this action, the plaintiffs were bound to make out a case against the defendants sufficiently strong to warrant the jury in convicting the defendants under the statute against obtaining goods upon false pretences. And the evidence, in his opinion, being clearly short of that, he nonsuited the plaintiffs, who again excepted. They now move for a new trial, on a bill of exceptions.

*I. Harris*, for plaintiffs.

*S. Stevens*, for defendants.

*By the Court*, COWEN, J. Clearly, the proof tended to show that William Hotailing obtained the goods fraudu

## Cary v. Hotelling.

lently; and it is not denied that fraud, especially if it be indictable, may so far avoid a sale that an action of trover will lie. It is denied, however, that an action of trespass will lie; and it is said that therefore this action of replevin for a wrongful taking, which is strictly concurrent with trespass, will not.

The general doctrine is perfectly settled, that fraud avoids a contract of sale. (*Bristol v. Wilsmore*, 1 *Barn. & Cress.* 514. *Kilby v. Wilson*, 1 *Ryan & Moody*, 178. *Root v. French*, 13 *Wendell*, 570.) These were all cases of buying goods, with a preconceived design of not paying for them. In the first, Abbott, Ch. J. said, "it prevented the property passing." In the second, he said the same thing. And in *Root v. French*, Savage, Ch. J. states the same rule; but suggests a distinction as to the remedy, which was not in the case, and which, on more reflection, I am sure he would have repudiated. *M'Carty v. Vickery*, (12 *John. R.* 348,) on certiorari from a justice's court, decides that trespass will not lie in such a case; and even adds, that the property is changed. But no case is cited, nor any principle or analogy mentioned on which to rest either proposition. And there are numerous cases to the contrary. That the property does not pass, I add to the cases already cited, the following: *Allison v. Mathieu*, (3 *John. R.* 235, 8;) *Van Kleef v. Fleet*, (15 *id.* 147, 151;) *Buffington v. Gerrish*, (15 *Mass. R.* 156;) *Abbotts v. Barry*, (5 *Moor.* 98, 102;) *Lupin v. Marie*, (2 *Paige*, 169;) *Andrew v. Dieterich*, (14 *Wendell*, 31;) *Mowrey v. Walsh*, (8 *Cowen*, 238;) *Tamplin v. Addy*, (*id.* 239, note;) *Putnam, J. in Badger v. Phinney*, (15 *Mass. R.* 364;) *Irving v. Motley*, (7 *Bing.* 543; 5 *Moor. & P.* 380, S. C.) All these cases hold, in terms, what was asserted by Dallas, Ch. J. in *Abbotts v. Barry*, viz. "The sale being effected by fraud, it is clear that a sale of this description works no change of property. The wines must be considered as remaining in the plaintiffs, as the original owners."

This being so, the civil remedies of the party defrauded are clear, viz. trover, or replevin in the *detinet*; or trespass



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or replevin in the *cepit*, at his election. Trover will lie without demand and refusal, because the original taking is tortious. (*Thurston v. Blanchard*, 22 *Pick.* 18, 20.) I admit that *Buffington v. Gerrish* speaks nothing in favor of the remedy, as for a trespass; because, although the action was replevin, this has long since been holden in Massachusetts to lie for a mere unlawful detention. (*Badger v. Phinney*, 15 *Mass. R.* 359. *Baker v. Fales*, 16 *id.* 147, 150, and cases cited at the last page. *Marston v. Baldwin*, 17 *id.* 606.) But for the purposes of the civil remedy, however it may be with the criminal, on the distinction between bailment and sale, the cases with the exception of *McCarty v. Vickery* are all one way, if we take the point as established, that neither works any change in the property of the goods. The general and absolute ownership still remains in the vendor or bailor; and not only the original interference with the property on the part of the vendee or bailee, but any subsequent acts of ownership on his part, may be considered as an unlawful or tortious taking. (*Putnam, J. in Badger v. Phinney*, 15 *Mass. R.* 359, 364, and in *Baker v. Fales*, 16 *id.* 147, 150.) The general owner holds the constructive possession of personal property; and this is sufficient to maintain trespass, though the actual possession be in another. (*Putnam, J. ut supra. Putnam v. Wyley*, 8 *John. R.* 432. *Thorp v. Burling*, 11 *id.* 285. *Aiken v. Buck*, 1 *Wendell*, 466. *Root v. Chandler*, 10 *id.* 110.) It is said, that the owner consented to the taking, and were that so, it would undoubtedly be a sufficient answer. But consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake. (*Putnam, J. ut supra*, 15 *Mass. R.* 364. *Poth Obl. pt. 1, ch. 1, § 1, pl. 19.*) This is plain enough with regard to executory contracts, not under seal. They are, if obtained by fraud, mere nullities; and the defendant, when sued upon them, may say he did not promise, however full and formal may have been his ostensible promise. The rule has been as broadly laid down in respect to simple

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contracts of sale, by most of the cases already cited, respecting fraud in such contracts. In *Wilkins' case*, (1 *Leach*, 522, 3, 4th ed.,) Gould, J. said: "It is a rule of law, equally well known and established, that the possession of the true owner cannot be divested by a tortious taking. So, where goods are taken from the true owner, *by means of fraud*." An act may be void as to one person, or for one purpose, though not as to another person, or for another purpose. It would not lie with the vendee to allege the fraud, and he might therefore be charged for the price, as a purchaser. Whether he shall be so charged, or treated as a trespasser, lies in the election of the injured party. (*Walworth, Ch. in Lloyd v. Brewster*, 4 *Paige*, 541.) So, in one case, it was held, that the contract of sale is not always void as against a *bona fide* purchaser from the fraudulent vendee. (*Mowrey v. Walsh*, *ut supra*. *Rowley v. Bigelow*, 12 *Pick. R.* 307, *S. P.*) In the latter case, Shaw, Ch. J. said: "They [the vendors] might treat the sale as a nullity, and reclaim their goods." At least, as between the immediate parties, the vendor may say to the vendee, "I was not the agent of sale and delivery. You took the goods from me by means of false representations, and, in a legal sense, without my consent, and against my will."

Even a contract under seal, executory or executed, may be treated as void, if fraud have been committed in procuring its execution.

That the owner's mere manual delivery of goods, will not save the deliverer from the imputation of trespass, is illustrated in the case of a bailment obtained with an intent to deprive the owner of his property. The bailee is considered as the taker, and may be convicted of larceny, under an indictment alleging that he *feloniously stole, took* and carried away the property, contrary to the owner's consent. The form of a sale, unless within the statute as to false pretences, saves him from the charge of *taking* in a criminal sense; but for all civil purposes, there is no delivery any more than in the case of bailment. In other

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words, for the purposes of a civil suit, the sale is void ; though for the purposes of a criminal prosecution, it is voidable only. Within the issue of not guilty, in trespass, or *noncepit* in replevin, there is no more a taking in the case of the fraudulent bailment, than in that of the fraudulent sale.

The degree of fraud, therefore, as whether it be indictable or not, is of no consequence on the question of nullity, when we speak in a civil sense. This was held in so many words, by the case of *Irving v. Motley*. That the fraud need not amount to the obtaining of goods under false pretences, within the statute, Park, J. took particular pains to show, in consequence of what counsel had sought to infer from a previous case in the decision of which he had participated ; viz: *Noble v. Adams*, (2 Marsh. 366. See the opinion of Park, J. 5 Moore & Payne, 396.)

Root's testimony should have been admitted. On questions of intent to defraud, other acts similar to the offence charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed as that which is in issue, are admissible with a view to the *quo animo*. The case of fraud is among the few exceptions to the general rule, that other offences of the accused are not relevant to establish the main charge. The authorities are quite numerous, both in this and other courts. Most of them are cited in *Cowen & Hill's ed. of 1 Phil. Ev. note 333, p. 452 ; id. note 352, p. 465*. In *Irving v. Motley*, (7 Bing. 543, 5 Moore & Payne, 380, S. C.) such evidence was received to establish the very kind of fraud now in question before us. The reason for its reception was given by Alderson, J. (*Vid. 5 Moore & Payne, 398.*) *Rowley v. Bigelow*, (12 Pick. 307,) is also to the same point, in all respects. (*Vide also Jackson, ex dem. Bigelow, v. Timmerman*, (12 Wendell, 299 ; *M'Elwee v. Sutton*, 2 Bail. 128 ; *Lowry v. Pinson*, *id.* 324.)

The result is, that the motion for a new trial should be granted, the costs to abide the event.

New trial granted.

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Olmsted v. Hotailing.

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**OLMSTED and others vs. S. HOTAILING & W. HOTAILING.**

Where one of two partners obtains goods by a fraudulent representation as to the solvency and credit of the firm, and afterward the firm sells the goods, replevin in the *cepi* lies against both.

*Semble*, that one claiming property through the fraudulent act of an agent, or partner, is affected by that act, so far as his civil rights are concerned, the same as if it were his own, even though he be morally innocent.

The doctrine held in *Cary and another v. Hotailing and Hotailing*, (*ante* p. 311,) that, on questions of fraud of this nature, other contemporaneous purchases effected through similar frauds by the same party, are admissible in evidence, is affirmed.

REPLEVIN, for taking and retaining forty-five barrels of flour, tried at the Albany circuit, in June, 1839, before CUSHMAN, C. Judge. Plea *non cepit*.

The plaintiffs' proof tended to make out a case similar to that of Cary and Cary, against these same defendants; (*see ante*, p. 311;) and most of the questions raised and decided in that case, were also made in this. The only additional point here raised, was upon the liability of Samuel Hotailing. William, the other defendant, purchased the flour in question of the plaintiffs' agent, Lyman Root, at Albany, on the 29th of August, 1837, Samuel being then in New-York; and the fraudulent representations, which were like those in the other case, were made by William. The plaintiffs' agent caused the flour to be shipped by Samuel; and a few days afterward, the defendants sold it.

Joseph Cary, one of the plaintiffs in the former suit mentioned, was called for the present plaintiffs, and testified to the fraud practised upon him and his partner, in respect to the flour and tongues there in question. The defendants objected to the testimony as irrelevant, but the judge overruled the objection, and the defendants excepted.

On the plaintiffs resting, the defendants moved for a nonsuit, on the ground, among others, that an action in the *cepi* would not lie, under such circumstances. The

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judge overruled the motion, and the defendants excepted.

The judge charged the jury in respect to the liability of the defendant Samuel, that if William was liable, Samuel was so also. The defendants again excepted; and a verdict having passed for the plaintiffs, the defendants now move for a new trial on a bill of exceptions.

*S. Stevens*, for the defendants.

*I. Harris*, for the plaintiffs.

*By the Court*, COWEN, J. That obtaining goods by fraud, though in the form of a sale, and though the fraud do not amount to an indictable offence, is a tortious taking within the issue of *non cepit*, we have just now held against these defendants. (*Carr & Carr v. Hotailing & Hotailing*, ante, p. 311.) Also, that in order to establish the charge, other contemporaneous purchases effected by similar acts of fraud, may be given in evidence. (*Id.*)

We held in the case cited, that obtaining goods in this manner does not change the general property as between vendor and vendee, unless the vendor elect to consider it as changed. It follows, that Samuel was jointly liable under the issue of *non cepit*, for his interference with the goods. Indeed, being a partner with William, the fraudulent act of the latter is, in respect to the question of property, imputable to Samuel. It does not lie with one to claim property through the fraudulent act of another, whether as his agent or partner, without being affected by that act the same as if it were his own. We speak in a civil, not in a criminal sense. The very point was held, as to an agent, in *Irving v. Motley*, (7 Bing. 543; 5 Moore & Payne, 380, S. C.) And as to a partner in *Kilby v. Wilson*, (*Ryan & Mood. N. P. R.* 178.) In *Taylor v. Green*, (8 Carr. & Payne, 316,) it was held, that where one assuming to be an agent, had committed a fraud in a sale, the mere adoption of the sale and receipt of the money, by the person for

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whom the sale was made, rendered him liable for the fraud though he was morally innocent.

New trial denied.

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### DATER and McMURRAY vs. WELLINGTON.

A submission by D. and M. on one side, and W. and his partner on the other, will authorize an award in favor of the former, against *W. alone*.

In an action on an award, a court of law cannot inquire whether the arbitrators erred on the merits, or acted corruptly—but only, whether the award is within the jurisdiction or power conferred by the submission.

That the arbitrators refused to swear the witnesses, but allowed them to be heard without oath, is at most mere error, and no defence to an action on the award.

On a motion to set aside an award, where provision is made for enforcing it by rule of court, other matters than those which are admissible as a defence to an action upon it, may be inquired into.

ASSUMPSIT, on an award of arbitrators, tried at the Rensselaer circuit, March 26, 1836, before VANDERPOEL, C. Judge. The submission was by parol. On the trial, the plaintiff's right to recover was contested on two grounds, viz. 1. Because the submission was between *Wellington and his partner* on one side, and the plaintiffs on the other, whereas the award was against *Wellington alone*. 2. Because the arbitrators refused to swear the witnesses on Wellington's side, contrary to his request, and took their statements without oath. The testimony was quite contradictory, and the circuit judge finally submitted the case to the jury with directions, that if they found the facts to be as contended for by the defendant on either point, he was entitled to their verdict. The jury found for the defendant and the plaintiffs now move for a new trial on a case.

*S. G. Huntington*, for plaintiffs.

*D. L. Seymour*, for defendant.

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*By the Court, COWEN, J.* The award was properly against Isaac Wellington, whether the submission were between the plaintiffs and him alone, or him and his partner. (*Fidler v. Cooper*, 19 *Wend.* 285, 288, *et seq.* and the cases there cited by *Bronson, J.*) That is to say, the arbitrators had power to award against Wellington alone. Whether they may not have erred on the merits, we, as a court of law, have no power to inquire.

The omission to swear the witnesses also, whether the parties had agreed that they should be sworn, or not; and whether the parties waived their being sworn, or not, is at most mere matter of error or mistake, which we cannot correct. (*Emmet v. Hoyt*, 17 *Wend.* 410, 413, and cases there cited by *Ch. J. Nelson.*)

The questions submitted to the jury, neither of them related to the power nor jurisdiction of the arbitrators. It is of these, alone, that the court of law can inquire, in an action on the award. (*Id.*)

There was no pretence of corrupt misconduct in the arbitrators; and, if otherwise, it would not be matter of inquiry in an action, (a) though such matter may be urged on a motion to set aside the award, in a case where provision is made that it shall be enforced by rule of court. (*Id.* *Wats. on Arb.* 213. 1 *Saund.* 327, a, note (5).)

We think the learned judge erred; and there must be a new trial, the costs to abide the event.

Ordered accordingly.

(a) See *Browning v. Wheeler*, (24 *Wend.* 256, 9.)

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Buck v. Wadsworth.

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## BUCK vs. WADSWORTH.

Where arbitration bonds required the award to be in writing, ready for delivery *to the parties* on or before a given day, and the arbitrators made an award, and delivered it to the prevailing party; *held*, that the other party, not having waived his right to a counterpart, and none having been prepared for him, the award was a nullity.

In bonds of submission, where the concluding part of the condition is thus—"so as the said award, &c. be made in writing, &c. and ready to be delivered to the parties on or before," &c.—these words import a limitation upon the power conferred upon the arbitrators, the observance of which is essential to their jurisdiction.

The only way in which an award under such bonds can be rendered binding, is by the arbitrators executing two parts, unless this is in some form expressly waived.

If one party tell the arbitrators they need make no counterpart, as he will not receive it, this will be deemed a waiver of his right.

An acceptance of a sworn copy of the award, in lieu of the original, is also a waiver.

MOTION to set aside the report of a referee. The action was debt, on an award made under mutual bonds, dated 6th March, 1839. The condition of the bonds was in the usual form, and concluded thus—"So as the said award, &c. be made in writing, &c. and ready to be delivered *to the said parties* on or before the 1st day of June, 1839." The arbitrators named were Humaston, Rhea, and Reeder. They made and signed an award without any counterpart, on the 23d March, 1839, and then separated, leaving it with Humaston to deliver, and appointing a day (March 26,) and place, where Humaston should deliver it; Wadsworth saying, he would send an agent to receive it. He did send Goff, who met Humaston at the day and place. The plaintiff also met them at the same time and place. Humaston, as he testified before the referees, stated, that they should first find for themselves, that is, for their fees, and then hand the award to the plaintiff. Goff mentioned that he was requested to appear and receive the award and papers for Wadsworth, the defendant. Humaston replied, the award was for Buck. He then read the decision, and



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reached Goff the award or minutes, who wanted to write to Wadsworth and give him the information. Goff took the award, expressed no dissatisfaction in not receiving a copy, and finally handed it back, saying he had taken minutes or a copy of the award. The witness, H., thought, when Goff requested the award, he wanted it to keep, supposing it in favor of Wadsworth; but he (witness) did not think it necessary to deliver an award to the losing party.

This suit was commenced in May, 1839; no award or counterpart having, as yet, been delivered to, or prepared for, the defendant Wadsworth. The referee having reported in favor of the plaintiff,

*Foster*, for the defendant, now moved to set aside the report.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. The words of the bond made it a condition, that the award should be ready for delivery on or before the first of June, to Wadsworth, as well as Buck. It was ready for delivery to the latter, but not to the former. The arbitrators did not even suppose an award was necessary for Wadsworth, and they accordingly never signed a counterpart. Even if Goff had the power, he did nothing which can be construed into a waiver of the right to insist on the delivery of an award to his principal. The only method by which an award made under the condition of a bond, such as this, can be rendered binding, is by the arbitrators executing and delivering two parts, unless the party shall expressly discharge them of that necessity; as, by telling them they need make no counterpart, for he will not receive it; or, as in *Sellick v. Addams*, (15 John. R. 197,) accepting sworn copies, in lieu of the original, without objection.(a) In short, nothing like a waiver exists in this case; and without that, it

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(a) See *Perkins v. Wing*, (10 John. R. 143.)

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is entirely settled that the award is a nullity, for want of its being ready within the terms of the condition. (*Pratt v. Hackett*, 6 John. R. 14.)

Motion granted.(b)

(b) As to the effect upon the award, of an omission on the part of arbitrators to comply with the *ita quod* clause, or other condition in the submission, as it relates to the *subject matter* submitted, the *time* of making the award, the *form* thereof, and other particulars, see *Cowen & Hill's Notes to 1 Phil. Ev.* p. 1027, *et seq.* and the cases there cited.

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FOSTER, assignee of Artcher, sheriff, &c. vs. RAINSFORD, impleaded with Slingerland.

Where the surety in a bond to the sheriff for the appearance of S. on a *capias ad resp.*, pleaded *comperuit ad diem*; a replication that S. was *an infant*, and did not appear by *guardian*, was held bad.

DEMURRER to replication. The action was in debt by Foster, as assignee of the sheriff, on a bond executed to the sheriff by Slingerland principal, and Rainsford his surety, on the arrest of the former in virtue of *capias ad respondendum*, conditioned that Slingerland should appear by putting in special bail. The declaration was in the usual form. Plea, by Rainsford, that Slingerland did so appear. Replication, that Slingerland was an infant, and did not appear by guardian. To this Rainsford demurred, and the plaintiff joined in demurrer.

H. G. Wheaton, for defendant Rainsford.

J. Percy, for plaintiff.

By the Court, COWEN, J. The replication is bad. The condition of the bond was, that Slingerland should appear by putting in special bail, &c. and the plea is, that he did so appear. This is a literal compliance with the condition. It is no answer to say that he was an infant and did not appear by guardian. The condition of the bond has no

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relation to the kind of agent by which Slingerland was to appear. The object was simply to secure the payment of the judgment to be recovered, so far as special bail may operate as a security. Surely the plaintiff would not have been content with his appearing by guardian. That would not have answered the bond; nor is there any need of a bond to compel such an appearance. Another remedy is given by the statute, which the plaintiff might have resorted to. (2 R. S. 364, 2d ed. § 10, 11, 12.) The court has always had rules by which they would protect the plaintiff against the consequences of an infant appearing by attorney; but a bail bond has never been understood to respect that. It has always been used merely to compel the putting in of special bail.

Judgment for defendant.

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BUTLER vs. PALMER.

The right of a judgment creditor to redeem from a mortgage sale, acquired by the act of April 18th, 1838, (*Sess. L.* 1838, p. 261.) became extinct on the 1st of November following.

Notwithstanding the act of May 12th, 1837, (*Sess. L.* 1837, p. 455,) gave the assignee of a mortgagor the right of redeeming at any time within a year from a sale under the mortgage; yet that right, though acquired before the act of April 18th, 1838, became extinct by operation thereof from and after the 1st of November following, whether the year had then expired or not.

A statute, though operating to lessen the time allowed for the exercise of a previously existing right, (e. g. a right to redeem,) is not therefore unconstitutional.

Whether the act of April 18th, 1838, would have been constitutional, had it attempted to take away existing rights of redemption absolutely, *quere*.

*Semble*, that the power of the legislature to interfere with vested rights is unlimited, save by the restrictions contained in the federal and state constitutions.

Where a statute repeals a former one which imposed a penalty, the right to the penalty becomes extinguished, even though a prosecution for it has been previously commenced. And if the repeal takes place after conviction, the judgment is thereby arrested. *Semble*.

The repeal of a statute conferring jurisdiction, takes away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal.

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Butler v. Palmer.

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Incumbrance rights generally, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute.

Otherwise, in respect to such civil rights as have been perfected far enough to stand independent of the statute; or, in other words, such as have ceased to be *executory*, and have become *executed*.

Positive enactments are not to be construed as interfering with previously existing contracts, rights of action, or suits, unless the intent thus to interfere be expressed in the enactment.

EJECTMENT, tried at the Otsego circuit, on the 10th of September, 1839, before GRIDLEY, C. Judge.

The premises in dispute formerly belonged to one Delong. The plaintiff made title under proceedings in chancery in his favor, against Delong, to foreclose a mortgage on the premises, which Delong had executed January 1st, 1830, and which had been assigned to the plaintiff. The decree was made on the first Monday of September, 1837; and the plaintiff having become the purchaser at the master's sale, for \$825, obtained his deed, dated December 11th, 1837. Delong was in possession at the time of the sale, and the master, when he sold, proclaimed that they would be subject to redemption; the master's deed, moreover, expressly stated, that the premises were "subject to be redeemed under the act of May 12th, 1837; and that the time of redemption would expire on the 10th of Dec. 1838." The defendant was in possession when the present suit was commenced.

On the part of the defendant, it was shown, that on the 25th of January, 1831, one Starbuck recovered a judgment in this court against Delong; and that by virtue of a *fi. fa.* regularly issued the premises in question were sold, October 25th, 1836, to E. Corning. Corning obtained the sheriff's deed February 2d, 1838, and then, by deed dated June 5th, 1838, conveyed to E. B. Morehouse, who, on the 6th of March, 1839, conveyed to the defendant. In the meantime, viz. on the 8th of December, 1838, Morehouse had paid to the master who made the sale under which the plaintiff claimed the premises, the amount for which the plaintiff had bid them in, with ten per cent. interest thereon from the time of sale, intending to redeem pursuant to the

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statute of 12th of May, 1837. The master, on the same day, (December 8th,) gave Morehouse a certificate of redemption. Morehouse then held what title he took under the deed from Corning; and was also assignee of a judgment, recovered in the Otsego common pleas against Delong, in favor of one Caryl, for \$67,49, docketed February 22d, 1832. This had been assigned (September 8th, 1836) to one Potter, and by him was assigned to Morehouse, on the 7th December, 1838. The proper papers to verify Morehouse's right to redeem were produced to the master at the time.

Delong continued in possession from the time of the master's sale till March 8th, 1839, when he surrendered the possession to Morehouse, under a warrant issued pursuant to the statute authorizing summary proceedings to obtain possession by a landlord against his tenant.

The defendant's counsel insisted, at the trial, that the premises had been duly redeemed under the act of May 12th, 1837, (*Sess. L. 455*;) therefore the master's deed was at an end.

The plaintiff's counsel insisted, that the redemption having been made after the repeal of that act by the subsequent act of 18th April, 1838, (*Sess. L. 261*,) the attempt to redeem was nugatory.

The circuit judge under these circumstances decided that, although Morehouse, when he came to redeem, was both an assignee of Delong and a judgment creditor, and had produced the necessary proof to the master of his right in these several capacities, yet the redemption did not bar the plaintiff's action. The defendant excepted; and a verdict having passed for the plaintiff, the defendant now moves for a new trial on a bill of exceptions.

*E. B. Morehouse*, for the defendant.

*J. A. Spencer*, for the plaintiff.

*By the Court*, COWEN, J. It is not denied that Mr. Morehouse acquired a right to redeem under the statute of May

12th, 1837, (*Session Laws of that year, p. 455,*) nor that his proceedings to redeem were in all respects conformable to the statute. This gave the mortgagor, or his assignee, a right to redeem at any time within one year from the time of sale under the mortgage, or under any decree for foreclosing the mortgagor. Mr. Corning took his deed and acquired a right to redeem in February, 1838, while the statute stood unlimited in its duration; and Mr. Morehouse, though he took title from Mr. Corning after the act of April 18th, 1838, (*Session Laws of that year, p. 261,*) must undoubtedly be regarded as standing in his place and holding all his rights under the first statute. While Mr. Corning held the right of redemption under that statute, the act of April 18th, 1838, was passed. This act (§ 5) extended the right of redemption under the former act to judgment creditors and others having a lien on the premises; thus letting in the right under the Caryl judgment of 1832, also acquired by Mr. Morehouse a few days before he came to redeem. The clause letting in lien holders to redeem was thus: "The words 'mortgagor, his personal representative or assigns,' in the first section of the act hereby amended, specifying who may redeem, &c. shall be held to include each and every person, &c. that have or shall have any legal lien," &c. This was entitled, an act *to amend the former, and limit its duration*; and the 9th section of it was thus: "The act entitled, &c. (act of May 12, 1837,) is hereby repealed; such repeal to take effect after the first day of November next."

It is difficult to see how Mr. Morehouse could claim any right to redeem as a judgment creditor. All his right in this respect (which I admit must be regarded the same as Caryl's) arose under the act of April 18th, 1838, and not having been exercised, fell with that act on the first day of November in the same year. The enactment was—"you may redeem as judgment creditor, if you will do so by that day." This he did not attempt till Dec. 8th, 1838. The very statute which gave the right, fixed the limitation; and had he stood upon his rights as a judgment creditor only,

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there would be no circumstances in the case calling for a struggle to save him from the ordinary effect of the repealing clause. The general rule undoubtedly is, that "When an act of parliament is repealed, it must be considered the same as if it had never existed, except with reference to such parts as are saved by the repealing statute." (*Per Lord Tenterden, C. J., in Surtees v. Ellison, 4 Mann. & Ryl. 586, 588; 9 Barn. & Cress, 750, S. C.*)

But Mr. Morehouse also came within the very terms of the first statute, and sought to redeem two days before the period limited by that act and the terms of the master's certificate had expired. He therefore insists, that Mr. Corning's right to redeem having become perfect under the first act, and before the repealing act passed, could not be, or at least was not intended to be divested by the latter.

In the first place, it is insisted that the legislature had no constitutional power to interfere with Mr. Corning's right; that he having purchased, and afterwards allowed the now plaintiff to bid in the premises at the master's sale, under a prior mortgage, upon the statute which gave him a full year to redeem after the sale, an obligation arose to allow the whole time; which obligation could not be impaired by state legislation. Had the repealing statute, in terms, taken away the remedy by redemption, against his debtor's property, the objection might be well founded. But it did not. It still left him from the 11th of December, 1837, to the 1st of the next November. This right of redemption was a matter of remedy; and admitting the repealing clause to operate against him, it would, therefore, seem to come clearly within those cases which declare statutes of limitation to be without the meaning of the constitution. (3 *Story's Com. on Const. U. S.* 251, and the cases there cited.) The statute was no more in effect than saying, "Unless you redeem within the shorter time prescribed, you shall have no action for a recovery of the land, nor shall your defence against an action be allowed, provided you get possession." Were the question *res nova*, we might feel great difficulty in distinguishing between the obligation

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of a contract and a remedy given by the law to enforce it. It is difficult, under the notion that obligation and remedy are essential to each other, to see how the latter can be impaired without producing the same consequence to the former. Yet, the authorities are abundant, both in the United States courts and our own, that a statute impairing the remedy is constitutional, especially when it operates merely by way of limitation in point of time. (*Jackson, ex dem. Lepper, v. Griswold*, 5 *John. R.* 139, 142.) At any rate, the argument, on constitutional ground, is no stronger against the last statute, than it is against the first. If allowed, therefore, it would operate as a two edged sword. Taken either way, it cuts down the rights of the defendant.

The next question is, whether, independently of the constitution, there be any rule of legislative power, or any rule of construction, by which we are bound to say that the right of Mr. Morehouse is withdrawn from the effect of the repealing clause; indeed, whether we can say so, consistently either with authority or principle. Strong expressions may be found in the books against legislative interference with vested rights; but it is not conceivable, that after allowing the few restrictions to be found in the federal and state constitutions, any farther bounds can be set to legislative power by written prescription. (*Vide Charles River Bridge v. Warren Bridge*, 11 *Pet.* 420.)(a) Every right resting in perfect obligation is vested; and such a right being conferred by statute, renders it no more sacred than if it were sanctioned merely by the law of nature, or the common law. A state statute granting a gratuitous pension, was repealed before any payment had been made under it. And a very learned court agreed unanimously that, if the grant did not amount to a contract, the pension was gone. A majority holding that it did not, rendered a judgment in favor of the statute, in an act on by

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(a) See the observations of Verplanck, senator, in *Cochran v. Van Stryck*, (23 *Wendell*, 365, 381, et seq.)



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the pensioner for its recovery. (*Dale v. The Governor*, 3 *Stewart's Ala. Rep.* 387.) Such a repeal certainly strikes one as highly impolitic. But independently of constitutional restraint, no approved writer can, I apprehend, be found either on our own, or the civil law, or the law of nature, who has denied the abstract power to repeal. Indeed, this power in our own legislature was expressly asserted and acted upon, in *The People v. Livingston*, (6 *Wendell*, 526, 530;) and that, too, in respect to an inchoate right of redemption. The question is thus reduced to one of mere construction on the repealing clause before us.

The effect of such a clause on a previous statute which imposes a penalty, or confers jurisdiction upon a court, even in civil cases, is not denied. In the first case, the penalty is gone, though the repeal take place while the prosecution for it is pending. (*Yeaton v. The United States*, 5 *Cranch*, 281. *The Schooner Rachel v. The Same*, 6 *id.* 329. *The United States v. Passmore*, 4 *Dall.* 372. *Commonwealth v. Duane*, 1 *Bin.* 601. *Abbott v. Commonwealth*, 8 *Watts*, 517. *Rex v. M'Kenzie*, *Russ. & Ry. Cr. Cas.* 429. In the latter, though the party may have instituted his suit, and it be pending at the time of repeal, the jurisdiction is gone, and with it all his right. (*Miller's case*, 1 *Black. Rep.* 451. *Stoever v. Immell*, 1 *Watts*, 258. *Road in Hatfield*, 4 *Yeates*, 392.) The repeal of a law imposing a penalty though it take place after conviction, arrests the judgment. (*Commonwealth v. Duane*, 1 *Bin.* 601, 608.) And in *Miller's case*, the repeal was held to work the same consequence against a civil right. A more full history of that case is given in 3 *Burr.* 1456, where it is reported as *Rex v. The Justices, &c. of London*. Under the act, 1 *Geo.* 3, *ch.* 17, § 46, called the compulsory clause, Miller, an imprisoned insolvent, had been compelled to assign his property, and was entitled to be discharged by an order of the court of quarter sessions, as early as the 26th September, 1761. But the 2 *Geo.* 3, *ch.* 2, had already passed, repealing the compulsory clause, such repea. to take place from and after the 19th of No

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member of that year. The insolvent urged his discharge; but the sessions adjourned from time to time till after the 19th, and then refused to grant it, on the ground that the repealing act had taken place. On motion for a mandamus, Lord Mansfield, Ch. J. delivered the opinion of the court, "that no jurisdiction now remained in the sessions." He recited the repealing clause, which to be sure was very strong, "that from and after, &c. the same is hereby repealed *to all intents and purposes whatsoever.*" But this, according to what was held in *Surtees v. Ellison*, and other cases on the repealing clause in 6 Geo. 4, ch. 16, was no more than a simple repeal. The first section of the 6 Geo. 4, simply repealed all the previous statutes of bankruptcy; but by the last section, the statute was not to take effect till the 1st September, 1825. And there being no saving clause as to the acts of bankruptcy committed, or any inchoate proceedings under the former acts, it was held, that the court had no power to imply a saving, although it was plain, that by a mere inadvertence in legislation, the kingdom was left for a time entirely destitute of its bankrupt law. The court were pressed for a construction which might avert so great a general evil. But Lord Tenterden said: "We are not at liberty to break in upon the general rule;" though he admitted it was very unfortunate that an act of so much importance should have been framed with so little care. In a previous case, Best, Ch. J. said, that on the 1st September, all the former acts were entirely got rid of. (*Maggs v. Hunt*, 12 Moore, 357, 359; 4 Bing. 212, S. C.) In a subsequent case, a struggle was made to save a deposition, as evidence, which had been taken to support a commission of bankruptcy, under the former statute, (5 Geo. 2, ch. 30, § 41,) but which deposition did not happen to have been enrolled, as that section required, in order to make it admissible. It was, in all other respects, completed under the former statute; but the party inadvertently omitted the act of enrolment, till after the repealing clause took effect. And the court held, that no right remained even to enrol, although the repealing act

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provided the like power of enrolment in proceedings under itself. In short, after much consideration, the court declared that the clause operated a simple repeal; and Lord Ch. J. Tindal laid down the rule applicable to such a case. He said: "I take the effect of a repealing statute to be, to obliterate it [the statute repealed] as completely from the records of the parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded*, whilst it was an existing law." (*Key v. Goodwin*, 4 *Moore & Payne*, 341, 351.) It will be perceived, that the rule laid down in this and several other cases, has no respect whatever to the circumstance that the repealed statute was either of a criminal or jurisdictional character. Nor is it perceived why, in case of a civil right, an exception is not just as practicable in favor of a jurisdiction given to enforce the right, as of the right itself.

It is scarcely necessary to observe, that, in all these cases, from that of *Miller*, down to *Key v. West*, there were stronger arguments either of individual justice, general policy or construction, from the provisions of the repealing acts, than we can find in the case before us. Here, the party had nearly the whole original time saved to him by the repealing statute; and the perfecting of his right depended on himself. In a majority of the cases cited, it was not so. The English enactments concerning bankruptcy were continued, with some modifications, by the act which contained the repealing clause. Here, the former act was condemned in its very principle by a general repeal. It had, moreover, existed but a short time, and very few rights could have arisen under it, compared with those which were cut off by the repeal of the English bankrupt laws. These considerations answer the argument used at the bar, that the legislature could not have intended to abridge the time of redemption, conferred by the act of 1837 on the mortgagor and his assigns, by the repealing clause in that of 1838, one object of which latter was, to confer the same

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right on creditors of the mortgagor having a lien. On authority, then, at least, no rights arising under the repealed statute can be saved, except by express reservation in the repealing statute, or where those rights have been perfected, by taking every step which depended for its force on the former act. Dwarris expresses the result of the cases in this way: "When an act of parliament is repealed, it must be considered, except as to those transactions passed and *closed*, as if it never existed." (*Dwar. on Stat.* 676.) The meaning of the exception is illustrated by an older case. The statute 1 and 2 Phil. & Mar. allowed devises to spiritual corporations, and such a devise was made and took effect. The subsequent repeal of the statute, by 1 Eliz. c. 1, was held not to affect the right of the devisee. (*Jenk. Cent.* 233, case 6.) It would not have been so, however, had the testator lived till the 1 Eliz. had been passed. In *People v. Livingston*, before cited, a creditor had, in August, 1829, acquired a right to redeem in a certain form under the then statute of executions, which, by an enactment in 1828, was to be repealed from and after the 31st December, 1829. The repealing statute substituted a new form of redemption. And Savage, C. J. was of opinion, that an attempt, after the 31st December, to redeem according to the old form, was nugatory. The right to redeem in a certain form being inchoate, and not expressly reserved by the repealing statute, it was held to have died with the old law, at the close of the year 1829. The decision seems to have been in exact conformity with the principle of the English cases.

A number of cases have been cited by the counsel for the defendant, and some very strong ones, to show that any enactment of the legislature annulling contracts, or creating new exceptions and defences, shall be so construed as not to affect contracts or rights of action existing at the time of the enactment. (*Gillmore v. Shooter's Ex'r.* 2 Mod 310. *Dash v. Van Kleeck* 7 John. R. 477. *Couch, q. l. v. Jeffries*, 4 Burr. 2460, 2. Vid. also *Churchill v. Crease*, 2 Moore & Payne, 415; 5 Bing. 177, S. C.; and

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*Terrington v. Hargreaves*, 3 *Moore & Payne*, 137, 143; 5 *Bing.* 489, *S. C.*) Cases are also cited, to show that a statute, in any way modifying the remedy of a party by action, shall never be so construed as to affect actions brought before the statute. (*Bedford v. Shilling*, 4 *Serg. & Rawle*, 401. *Duffield v. Smith*, 3 *id.* 590, 598, 9.) One case was cited, that a statute requiring sheriffs to deliver over all executions to their successors, though such executions were partly executed, should not touch sheriffs then in office. (*Osborne v. Huger*, 1 *Bay*, 179.) But these are all cases relating to positive enactments. None of them arose on a repealing clause; and they merely recognize the well settled rule, as laid down by Best, C. J. in the late case of *Terrington v. Hargreaves*, viz. "that the provisions of a statute cannot have a retrospective or *ex post facto* operation, unless declared to be so by express words, or positive enactment." (*Vid.* 3 *Moore & Payne*, 143.) But, both in that case, and *Churchill v. Crease*, an express provision was allowed to have such an operation. (*Vid. also The People v. Herkimer Common Pleas*, 4 *Wend.* 210.) All this is but following out the ancient rule of construction cited by the defendant's counsel from Bracton, and Coke's Institutes, (*Brac. lib.* 4, *fol.* 228; 2 *Inst.* 292;) a rule shown to be still more ancient, by the counsel's reference to the writers on the civil law and the law of nature. (*Taylor's Elem. Civ. Law*, 167, 8, 9. *Puf. B.* 1, *ch.* 6, § 6.) The strongest illustration in the books is, perhaps, to be found in *Dash v. Van Kleeck*, (7 *John. R.* 477.)

I understand the rule of the writers on the Roman law, perfectly to agree with that acted on by our own courts, in all their decisions, ancient and modern. These writers speak of rights which have arisen under the statute not being affected by the repeal; but the context shows at once what sort of rights they mean. The amount of the whole comes to this: that a repealing clause is such an express enactment, as necessarily divests all inchoate rights which have arisen under the statute which it destroys. These

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rights are but an incident to the statute, and fall with it, unless saved by express words in the repealing clause. We are also reminded from Bracton and the Institutes, that *nona constitutio futuris formam imponere debet, non præteritis*. (*Bract. lib. 4, fol. 288. 2 Inst. 292.*) *Pufendorf*, for instance, says: "The law itself may be disannulled by the author; but the right acquired by virtue of that law whilst in force *must still remain*." He adds: "Suppose it were a law that, as a man disposed of his possessions by will, so the right to them should stand. It would be very fair in the sovereign to retrench this liberty of testaments, and to order that, for the future, all these inheritances shall pass to the heirs at law. Yet it would be unreasonable to take away from persons what fell to them by will, while the former law was in use and vigor." To the same effect, *Dr. Taylor*, (*p. 168*,) cites the Digest, that the legislator cannot amend the law which to another has created a right, adding the same instance with *Pufendorf*. And this instance, it will be remembered, is the same as that reported in *Jenkins*, viz. a devise under a statute afterwards repealed. Here the right had so passed as to be not only vested, but to stand entirely independent of the statute. I know that rights of action, and other executory rights arising under a statute, are said to be vested. (*Couch v. Jeffries*, 4 *Burr.* 2462, and *vid. Beadleston v. Sprague*, 6 *John. R.* 101.) They are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract within the meaning of the constitution. But that being out of the way, and the statute being simply repealed, the very stock on which they were engrafted is cut down, and there is no rule of construction under which they can be saved. The very terms of the defendant's proposition, when plainly stated, would seem to show that he could have had no right, in the nature of things, after the first of November. His right to redeem depended on a statute which, he admits, had no existence at that time. The general distinction lies between those rights which are executed. and those

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which are executory; or, as it would have been expressed by the civil law writers, the *jus in re* acquired under the repealed statute, and the *jus ad rem* so acquired. An actual redemption before the first of November, would have presented an instance of the former; the mere right to redeem, is an instance of the latter. A right carried into judgment, or taking the form of an express executory contract under a repealed statute, might, perhaps, also stand on the same ground with the devise in Jenkins; and so of other rights having means of vitality independent of the statute. But where every thing depends on this, it seems to be equally a violation of principle as of authority to say, that any one of its provisions can be enforced or executed after it has been repealed by a general clause.

On the whole, we are of opinion, that the plaintiff's title became absolute on the first of November, 1838. The verdict is, therefore, right.

New trial denied.

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 CURTIS vs. HUBBARD.

Where a sheriff broke an outer door of a house for the purpose of levying on goods of the occupant; *held*, that the levy being illegal, even a visitor at the house might lawfully resist the sheriff's attempt to remove the goods, using no more force than was necessary for that purpose.

A new trial will not be granted because it appears by the bill of exceptions that the circuit judge, in pronouncing a *correct decision*, gave an *erroneous reason* for it. Though the outer door of a house is closed merely by being *latched* in the ordinary way, the sheriff has no right to enter for the purpose of levying by virtue of a *fi. fa.*

What would be a breaking of the outer door in burglary, will be equally a breaking by a sheriff who enters to make a levy.

If the outer door be shut, the sheriff has no right to enter, though the owner or occupant be absent; for the house, under such circumstances, is equally a protection to his family and goods, as to himself.

And, *semble*, the protection extends to the person and property of a guest within the house, unless he has gone there to avoid the process held by the sheriff; in which case, the latter, after demanding leave to enter, and being refused, may break open the outer door.

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TRESPASS, assault and battery, tried at the Oneida circuit April 23d, 1840, before GRIDLEY, C. Judge. The plaintiff was sheriff of Oneida, and having a *fi. fa.* against Schuyler Hubbard, the defendant's brother, went to Schuyler Hubbard's house for the purpose of levying. Schuyler Hubbard was in the door-yard, and forbade the sheriff's coming on the premises. The outer door of the house was closed and latched. The sheriff entered the yard, proceeded to the house, opened it, (Schuyler Hubbard not being in the house,) and went in; and being about to fetch away a clock he had seized on the *fi. fa.*, the defendant, who was there on a visit, and in the house, seized the sheriff as he was going out of it with the clock, and in the struggle that ensued, the sheriff was thrown down, but no more force was used than was necessary to prevent the sheriff from taking away the clock.

The judge nonsuited the plaintiff, saying that the sheriff having entered the house illegally, had no right to levy; and even if he had levied before, he had no right to enter; that forbidding the sheriff to enter the premises, was equivalent to forbidding his entry into the house; that there was no proof of excessive force, &c. The plaintiff excepted, and now moves for a new trial on a bill of exceptions.

*C. P. Kirkland*, for the plaintiff.

*C. Tracy*, for the defendant.

*By the Court*, COWEN, J. No doubt a prohibition to enter on the premises, comprehended the house; but none was necessary. The outer door was shut. That was itself a prohibition.

There was no evidence of a previous levy. The remark of the judge, therefore, in the course of giving his opinion on the motion for a nonsuit, that even a previous levy on goods in the house would not entitle the sheriff to break the outer door, was but giving a wrong reason for a cor-



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rect decision. The true reason was, that he had made no levy.

There was nothing to submit to the jury on the question of excess.

But the point is made, that merely lifting the latch and thus opening the outer door, is not such a forcible breaking as the law forbids to a sheriff who holds civil process; and that the act must come up to a positive breaking, or, at least, the removal of some extraordinary fastening.. The rule is clearly otherwise. It is enough that the outer door be shut. Then, merely opening it is a breaking, within the meaning of the law; and so all the books treat the matter. What would be a breaking of the outer door in burglary, is equally a breaking by the sheriff. These views may be collected from the following cases: *Penton v. Brown*, (1 *Keb.* 698;) *Seyman v. Gresham*, (*Cro. Eliz.* 908;) *Biscop v. White*, (*id.* 759;) *Ratcliffe v. Burton*, (3 *Bos. & Pull.* 223;) *Lee v. Gausell*, (*Cowp.* 1, 5;) *Haggerty v. Wilber*, (16 *John.* 288;) *Buckenham v. Francis*, (11 *Moore*, 40.) In this last case, a plea that the defendant peaceably and quietly entered the plaintiff's dwelling house, to execute a *fi. fa.* against his goods, was held bad, because it did not allege that the outer door was open. (*Vid. also Bradby on Distr.* 136.) Lifting a latch is, in law, just as much a breaking, as the forcing of a door bolted with iron. The ordinary fastening is enough. Even sliding down a window fastened with pulleys, is such a breaking as would formerly cost a burglar his life; (2 *Russ. on Crimes*, 5, *Am. ed. of 1836*;) and a sheriff entering a house in that way to execute civil process, would be a trespasser.

But it is said, Schuyler Hubbard was not within. The outer door being shut, is equally a protection, whether the owner or possessor be within at the time or not. It is a general and unqualified protection against an officer having civil process, for the man, his family and goods. (*Lemayne's case*, 5 *Co. Rep.* 93, 5th resolution.) And this includes every guest who is at the house, and also his

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goods, unless he has flown to the house, or carried his goods there, in order to avoid the process. In the latter case, the sheriff may break the door; but not even then, till after a demand of leave to enter, and a refusal. (*Id.* *Lee v. Gausell, Cowp.* 6.) The defendant was a mere guest; yet he was there on a visit to his brother's house, and might on this ground, even without his brother's request, interpose and prevent the sheriff from violating the house in any way. *Pro hac vice*, it was his own house.

New trial denied.(a)

(a) See *The People v. Hubbard*, (24 *Wendell*, 369.)

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 MURPHY vs. COCHRAN.

A judgment is a chose in action, within the statute, (2 *R. S.* 274, § 5, 2d ed.) authorizing assignees, in certain cases, to sue in their own names: and a *scire facias quare executionem non*, is a suit, within the same statute.

Where the assignee of a covenant sued, and recovered judgment thereon in the name of the assignor, after which the latter died, and no executors or administrators were appointed upon his estate; *held*, that the assignee might sue out a *scire facias*, &c. in his own name.

*Semble*, that the *scire facias*, in such case, should show the residence of the assignor at the time of his death.

The *scire facias* reciting the assignment as under the assignor's *hand and seal*, sufficiently showed that it was made upon a valuable consideration, without the fact being otherwise alleged.

Though the covenant was to the assignor and another jointly, yet, as judgment upon it had been recovered in the assignor's name alone, the defendant was held estopped from denying the assignor's right to assign.

In *scire facias* by an assignee, it need not appear that the defendant had notice of the assignment.

A *scire facias* in the usual form, setting out that *execution yet remains to be made*, is sufficient, without showing in terms that the *judgment is unsatisfied*. If such be the fact, the defendant may plead it, and that will bar the suit.

Where an assignee sues out a *scire facias* in his own name, the assignment being a material and traversable fact, must be set forth with circumstances of time and place, or the defendant may demur.

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DEMURRER to *scire facias*. The writ recited, that John Snyder recovered judgment in this court on or about the 14th of May, 1826, against Walter L. Cochran, for \$3634,27, or thereabouts, for his damages, &c. as well on occasion of a breach of covenant, &c. made by the said Walter to the said John, as for his costs, &c. That some time in the summer of 1838, in the town of Morristown, in the county of St. Lawrence, the said John died intestate, and no letters of administration have since been granted of or upon his estate. That said John, in his life-time, for a valuable consideration, under his proper hand and seal, duly assigned to one Henry Murphy a right of action upon a covenant of warranty in a deed bearing date September 13th, 1813, executed by said Walter and Cornelia his wife to said John and Elizabeth his wife, &c. That, in pursuance of said assignment, said Henry, in the name of said John, on, &c. obtained the judgment aforesaid. And now, in behalf of said Henry, assignee as aforesaid, we having been informed that although judgment, &c. yet execution, &c. still remains to be made, &c.; and we being willing, &c. do command, &c. that you make known to the said Walter, &c.

The defendant demurred, assigning the following causes of demurrer: 1. That it is not alleged where said John resided at the time of his death, nor to what surrogate the granting of letters belonged: 2. That the covenant of warranty, so far as appears by the *scire facias*, was not the plaintiff's property by virtue of the assignment: 3. That neither the time nor date of the assignment, nor notice thereof to the defendant, is set forth: 4. It is not alleged that the judgment remains unsatisfied: 5. The statute does not entitle the plaintiff to execution in his own name, it not extending to the case made by the *sci. fa.*

The plaintiff joined in demurrer.

*M. T. Reynolds*, for the defendant.

*J. A. Spencer*, for the plaintiff.

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*By the Court, COWEN, J.* This *scire facias* is founded on the 2 R. S. 274, 2d ed., § 5, which enacts, that the assignee, for a valuable consideration, of any bond, note or other chose in action, which has been or may hereafter be assigned, if the assignor be dead and there be no executors or administrators appointed upon his estate, or if they have no interest, &c. or refuse, &c. may sue and recover in his own name, &c.; and the defendant, until due notice of such assignment, &c. may avail himself of any defence he might have had against the assignor

1. If necessary to set forth the residence of Snyder when he died, as it may have been, it is sufficiently done.

2. The assignment is shown to have been under the hand and seal of the assignor, which sufficiently imports a valuable consideration.

3. The defendant cannot now object that Snyder was not the sole covenantee, for the original suit and judgment were in his name alone; and though the covenant ran to him and his wife, yet it may have survived to him by the death of his wife. Whether he had a right to sue in his own name or not, however, he did sue, (or rather, the now plaintiff for him,) and recovered judgment in his (Snyder's) own name; and the defendant is estopped to deny that he (Snyder) was solely interested. It would be no defence against Snyder, if alive, and suing in his own name; and so not a defence at the suit of his assignee under the statute. It must be taken, that Snyder alone had a right to assign the covenant to the plaintiff; and this, it is averred, he did do before judgment. The present plaintiff, therefore, must be considered as the equitable assignee of the judgment, as he was before of the covenant. Thus, he is brought within the word *assignee*, used in the statute.

4. It was not necessary to aver notice of the assignment to the defendant. This, with the time when given, would rather come by way of replication, to oust him of any defence he might set up by plea; or, in a proper case, the notice, &c. may be given in evidence as an answer to any defence which may be interposed under the general issue.

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The fact of notice can in no way become material till a defence is interposed, which, if it arise after notice, will not be available.

5. The assignee of a *judgment* may sue. The words, *chase in action*, used by the statute, comprehend a judgment.

6. The assignee may have a *scire facias*. The statute is, that he may *sue*, without mentioning any particular suit. A *scire facias* is a *suit* or *action*. (*Toml. Law Dict. tit. Scire Facias, I. Id. tit. Suit.*) The statute means, that the assignee shall, in case of the death of the assignor, &c. have the same remedy in his own name, as the assignor, if alive, might have. The case does not, therefore, as was supposed on the argument, depend on the particular provisions of the revised statutes concerning the writ of *scire facias*, so far as the question of the party plaintiff is concerned. The statute under which the plaintiff sues, brings over or extends the statute of *scire facias* to his case.

7. Another point made is, that the *scire facias* does not recite that the judgment is unsatisfied. True; nor need it do so. This is a *scire facias quare executionem non*; and it is enough to follow the established precedents in such case, saying, as it does, that *execution yet remains to be made*. If the judgment be paid, the defendant may plead the payment; and that will be a bar to the suit.

8. I believe I have now considered every objection which was taken at the bar, except one mentioned in the third specification of causes for the demurrer, viz. that neither the time nor date of the assignment is shown. The assignment is a material and traversable fact; and must therefore, according to the well settled rules of pleading, be set forth with circumstances of time and place, if these be called for, as time is here, by special demurrer.

We are of opinion, that none of the defendant's objections are well taken except the one last mentioned, which is merely formal. For this cause, however, there must be judgment for the defendant, with leave to amend.

Ordered accordingly.

## Germond v. The People.

GERMOND and another vs. THE PEOPLE, *ex rel.* Taylor and others.

The right of a court of special sessions to take from the complainant a bond as security for costs, pursuant to 2 R. S. 597, § 20, 2d ed. depends upon a previous condition; viz. an acquittal by *legal* authority, not a *conventional* one.

Where a bond of this nature was taken on the discharge of S. accused of an assault and battery, and in an action upon it the defendants pleaded, that S. having demanded of the special sessions a trial by jury, *three* jurors appeared, who alone heard the evidence and pronounced S. not guilty, whereupon the justices certified, &c.; *Held*, that a replication alleging this form of trial to have been adopted by agreement between the people's counsel, the complainant and S., whereupon, &c. was bad, as not showing any acquittal *by the court*.

Otherwise, *semble*, had it appeared by the replication, that after the rendition of the pretended verdict, *the court* acted on it, and pronounced an acquittal; for then, though the proceeding might have been *erroneous*, it would not have been absolutely void.

The rule that consent will not confer jurisdiction, applies as well to consent in creating a tribunal, as to consent in submitting a matter to a subsisting tribunal which the law has excluded from its cognizance.

The complainant in a court of special sessions is a *party*, as it respects the question of costs.

*Semble*, that the defendant's right to a jury trial in a court of special sessions, may be waived by agreement at any time before judgment, and he be tried by the justices.

Nothing contained in a bond by way of recital will estop a party to it from showing it to be void, as having been taken by an officer *colore officii* and without authority of law.

ON error from the Dutchess common pleas. The action below was debt, by the people against Germond and Bowman, for \$23, the penalty of a bond executed by them. The bond, as declared on, recited, that at a court of special sessions before three of the justices of the peace of Dutchess county, for the trial, on a given day, of one Stevens, upon the complaint of Germond, for an assault and battery, Stevens *was acquitted*; and that the said court did certify in their minutes that the complaint was wilful and malicious and without probable cause. The bond was then conditioned, that if Germond should pay the costs that had accrued to the said court and constable in the proceedings

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upon the complaint, amounting to the sum of \$11,50, in thirty days after the said trial, then, &c. Breach, non-payment.

The defendants in the court below pleaded, that Stevens demanded a trial by jury, whereupon the justices *swore three persons and no more, of the jury*, and *with them* proceeded to the trial, *who found Stevens not guilty*; whereupon the justices ordered Germond to pay the costs of the trial, viz. \$11,50, which had accrued to the court and constable, or give satisfactory security, by bond, to pay the same within thirty days; whereupon Germond and Bowman executed the said bond; averring that it was therefore void.

Replication, that the justices issued a venire, which was returned with a panel of twelve persons' names, three only appearing on their names being drawn. That thereupon Germond and the counsel for the people and Stevens *agreed, that the three should be the only jurors to try the complaint*. That they were accordingly *sworn, sat together, heard the evidence, and rendered a verdict to the said court so convened, &c. that the said Stevens was not guilty*; and the said justices did then and there certify, in their minutes, &c.

The defendants in the court below demurred to the replication, and the plaintiffs joined in demurrer. Judgment having been rendered by the C. P. that the replication was sufficient the defendants below brought error.

*M. T. Reynolds*, for plaintiffs in error.

*W. Eno*, contra.

*By the Court*, COWEN, J. The pleadings show that the bond was based on the alleged acquittal by the verdict of three men; not by the court. If this defect was not cured by consent, most clearly the whole was void, and may be impeached collaterally, as was held in 3 Keb. 362, (*Case 42*), in debt for an amercement, assessed in a court leet by less than the legal number of jurors. But consent will not

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give jurisdiction; and the rule applies as well to consent which creates a tribunal, as to that which submits a subject matter to a subsisting tribunal which is an utter stranger to it.

The statute provides, that whenever a defendant, tried either by a court of special sessions itself or by a jury of such court, shall be *acquitted*, he shall be immediately discharged; and if the special sessions shall certify as the declaration below stated that they did in this instance, a bond such as the people declared on in the court below, may be taken. (2 R. S. 597, 2d ed. §§ 20, 21.) The defendant may demand of the special sessions a jury of six; which it would doubtless be an error to refuse; but if he do not, the court may try him without. The jury are to be sworn, hear the evidence, and render a verdict. (*Id.* 595, 6.)

In the case at bar, the special sessions had complete jurisdiction in regard to the subject matter, and the person both of the complainant and the defendant; and there is not the least doubt that the jury, being allowed by law to the defendant for his benefit, he may, so far as he is concerned, waive that benefit at any stage of the proceeding before judgment, and submit to a trial by the court. And there is as little doubt that the complainant may accede to such waiver; and then, an acquittal by the magistrates themselves may be followed by a certificate to charge him with costs, pursuant to the statute. Here the jury was waived by both parties. I say both *parties*, because the statute makes the complainant a party to the question of costs. And if, upon the pleadings, we could find enough to warrant us in saying that the *court acquitted* Stevens, the certificate, and therefore the bond, were well enough. But I do not see how that can be said. It is true that in such case, six persons and no less being known to the law as a jury, and the parties going on with less, the trial, if one is to be had, necessarily devolved upon the justices. But judicial action as a special sessions is necessary. *They* must *acquit*; and the replication, so far from insisting on such action, admits, indeed avers, that what is called an *acquittal*, was by the mis-



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 Germond v. The Peop'le.
 

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called verdict of a miscalled jury, three men sitting and awarding, not under any authority conferred by law, but by the parties; three men who were arbitrators at most, and whose finding was not adopted as the voice of the special sessions. Had the replication added, that on the pretended verdict being pronounced, the *court* thereupon acted on it as a verdict and pronounced an *acquittal*, I admit this would have been error merely, and not questionable in a collateral way; but only by certiorari, if questionable at all. (*Griffin v. Mitchell*, 2 Cowen, 548. *Butler v. Potter*, 17 Johns. R. 145. *Relyea v. Ramsay*, 2 Wendell, 602. *Horton v. Auchmoody*, 7 id. 200. *Germon v. Swartwout*, 3 id. 282.) The objection is, not that the court *wanted* jurisdiction, but that they *never exercised it*. The case is like an inferior court issuing an execution without first rendering any judgment. The right to demand a bond and commit the complainant for default of giving it, depends upon a previous condition—an *acquittal* by a *legal*, not a *conventional* authority.

It is insisted that the defendants' bond reciting an acquittal, estops them to deny it.(a) If that were so, the estoppel was not replied, nor did the plaintiffs demur. On the contrary, they admitted that there was no acquittal, unless that can be called so which is pronounced neither by court nor jury. But the case is not one of which an estoppel can be predicated. It might have been at common law, especially in respect to the surety; but the 2 R. S. 214, 2d ed. § 60, declares, that any bond, &c. taken by an officer, by color, &c. in any other case or manner than such as are provided by law, shall be void.

We think the court below erred; and the judgment should therefore be reversed.

Judgment reversed.

(a) In regard to the admissibility and effect of recitals as evidence, and when they operate by way of estoppel, see Cowen & Hill's Notes to 1 Phil. Ev. pp. 160, 1—1235 to 1238.

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Hanford v. Artcher.

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**HANFORD vs. ARTCHER.**

A judge may lawfully refuse to modify his charge to the jury, where the modification requested would not vary the *legal effect* of the charge, but only its *phraseology*.

Accordingly, on a question of fraud as to creditors arising under 2 R. S. 70, § 5, 2d ed., where it appeared that the debtor had assigned the property in question ostensibly in trust for creditors, that the plaintiff purchased it of the assignees, and then entrusted it to the debtor to sell, but the property had never been removed from where the debtor kept it when he assigned: *Held*, that after the judge had read the statute to the jury, and told them, the question of fraudulent intent was one of fact for their decision, he was not bound, on the request of counsel, to charge afterward, *that if they believed the sale was made in good faith, and without any intent to defraud creditors, it was valid.*

And the judge having charged the jury to inquire, whether the assignment had been accompanied by an immediate delivery, and followed by an actual and continued change of possession; and that if so, their verdict should be for the plaintiff: *Held*, he was not bound, though requested, to charge afterward, *that if the plaintiff when he purchased, actually and bona fide employed the debtor as his agent to sell, &c. it would not render the sale void*; for this was included in the charge given.

Where a charge is requested in favor of a given proposition, which the judge cannot legally sanction without connecting other matters with it, he may overrule the request absolutely. Accordingly, he having been called on in this case to charge, *that if the assignees took and retained possession till the plaintiff's purchase, his employing the debtor as his agent did not render the sale void*: *HELD*, that as the correctness of the proposition depended on the particular nature and object of the employment, the decision of the judge overruling it was proper.

One of the assignees in this case was called as a witness for the plaintiff, who put him the following question: "So far as you are concerned, was there any actual fraud in the whole transaction?" *Held*, irrelevant, as being an inquiry after the secret operations of the witness' mind, which could not affect the case one way or the other. And *semble*, the question was also objectionable, as being *leading*.

REPLEVIN, tried at the Albany circuit, October 9th, 1839, before CUSHMAN, C. Judge. The plaintiff's title to the goods in question was by a sale to him, from the assignees of one Norton. The latter kept a boot and shoe store, and, before the assignment, these goods constituted a part of his stock in trade. He made an assignment of them, in trust for creditors, and soon after, the assignees sold

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Hanford v. Archer.

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them to the plaintiff. The plaintiff thereupon made Norton his agent or clerk, and the latter took charge of the goods in that capacity as the plaintiff alleged, to sell, &c. The goods remained at the store where they were at the time Norton assigned them, and had never been removed.

The defence was, that though Norton continued in possession ostensibly as clerk or agent, the whole was fraudulent as against creditors; wherefore the defendant, as sheriff, and in virtue of a *fi. fa.* in favor of the Commercial Bank against Norton, took them, &c. Evidence was given tending to establish this defence.

The plaintiff gave evidence that the sale to him was upon an adequate consideration; also, evidence tending to show that after the assignment and before the sale to the plaintiff, the assignees had the exclusive control of the goods.

Both parties gave evidence upon the question, whether Norton's alleged situation as clerk or agent of the plaintiff was real, or colorable merely and part of a scheme to enable him to keep the goods or their avails from creditors.

Among other witnesses called by the plaintiff to repel the fraud, was Mr. Russell, one of the assignees, to whom the plaintiff's counsel put this question: "So far as you are concerned, was there any fraud in the whole transaction?" To this the defendant's counsel objected, and the circuit judge sustained the objection; whereupon the plaintiff's counsel excepted. The judge charged, that the question of fraudulent intent was a question of fact for the jury, reading to them 2 R. S. 70, § 5, 2d ed. That the first question of fact was, whether the assignment had been accompanied by an immediate delivery, and followed by an actual and continued change of possession. If the jury found it had, they must find for the plaintiff; if otherwise, they must inquire whether there was any good reason shown, which they could approve, for non-delivery, and the want of an actual and continued change of possession. If they found such good reason, then the verdict

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Hanford v. Archer.

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must be for the plaintiff. If there was no delivery and continued change of possession, the law presumed fraud. But the plaintiff might rebut this presumption, by showing the assignment was made in good faith, and without any intent to defraud creditors. It was for the plaintiff to explain, why there was no change, if there was none; and if he had done so, the jury should find for the plaintiff; otherwise for the defendant.

The plaintiff's counsel excepted to the charge given, and requested the judge to charge as follows: 1. That if the jury believed the sale was made in good faith, and without any intent to defraud Norton's creditors, it was valid; 2. If they believed the assignees took and retained possession till the sale to the plaintiff, the plaintiff employing Norton as his agent or clerk, did not render the sale void; 3. That if they found that the plaintiff, when he purchased the goods, actually and *bona fide* employed Norton as his clerk to sell the same, this would not render the sale void. The judge refused to alter his charge, and to such refusal the plaintiff's counsel also excepted. The jury found a verdict for the defendant; and the plaintiff now moves for a new trial, on a bill of exceptions.

*M. T. Reynolds*, for plaintiff.

*J. Van Buren*, for the defendant.

*By the Court*, COWEN, J. The judge told the jury that the question of fraudulent intent was a question of fact for them; and read 2 R. S. 70, § 5, 2d ed., directing, that if they found the assignment had been accompanied by an immediate delivery, and been followed by actual and continued change of possession, their verdict must be for the plaintiff; but if the goods continued in possession of Norton, the debtor, they must inquire whether any good reason was shown. That the explanation lay with the plaintiff, and if such good reason was shown, they should find for the plaintiff, otherwise for the defendant.

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Hanford v. Artcher.

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Leaving the question of fraud to the jury, and reading to them the fifth section of the statute, was fully equivalent to charging them in the language of the first instruction as prayed by the plaintiff's counsel.

The second prayer for instructions was wrong. Though the assignees took possession and held it till they sold to the plaintiff, it did not follow that his employing Norton as his agent or clerk, would not avoid the sale, without connecting several other considerations with it, especially the nature and object of the employment. It might have been with the direct and avowed object of defrauding the creditors, or some of them.

The third prayer for instructions was, that if the plaintiff, when he purchased, actually and *bona fide* employed Norton as his clerk to sell the goods, it would not render the sale void. This was virtually covered by the charge to inquire whether there had been an actual and continued change of possession. That involved the question whether Norton was employed as a mere clerk, agent or servant to the plaintiff, and was honestly to act for him in either capacity, or whether he was put in possession as the ostensible servant, but real owner, to take the profits for his own benefit, and keep them from the creditors. In the former case, there would have been a change of possession in one sense, for Norton's possession would have been that of the plaintiff; in the latter, it would have been his own continuing possession, and might have avoided the assignment and sale. The judge might, perhaps, with propriety have put this in the more specific form requested; but having substantially said the same thing in another form, he was not bound to modify his charge. The dispute was about the force of different words importing the same thing.

The question addressed to Russell, was clearly inadmissible. It was for the jury, not for him, to say whether he intended to commit a fraud. Of this, they were to judge from the whole transaction, uninfluenced by what might have been his secret intent. His conduct, and other facts

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Hays v. The People.

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to be collected from him and other witnesses, were the tests by which the jury were to decide. The operations of the witness' mind could not affect the question one way or the other. If there was no consideration for the assignment and no change of possession for instance, his honesty could not deprive the creditor of a right to take the goods in execution; and, on the other hand, if there was a good consideration, and an immediate delivery and continued change of possession, his fraudulent intent would not vitiate the assignment or sale. The conduct of others was mainly in question. The witness was a mere assignee, professing to have taken for the benefit of creditors. That he meant no fraud might well be, and yet the real actors have intended far otherwise. They might have used him as an innocent instrument, so that, after his answer one way or another, the case would have stood precisely where it did before. In either view, the question was irrelevant; and I suppose it was objected to and overruled for that reason, though no ground was mentioned.<sup>(a)</sup> If pertinent, however, another objection might have been, that it was a leading question, addressed by the plaintiff's counsel to his own witness. The motion for a new trial must be denied.

New trial denied.

(a) See per Cowen, J. in *Sizer v. Miller*, (*ante*, p. 227, 233, 234.)

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• HAYS vs. THE PEOPLE.

**An assault**, is an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person. It is not essential, to constitute an assault, that there should be a *direct attempt* at violence.

Where the prisoner decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure; *held*, that though there was no evidence of his having actually touched her, he was properly convicted of *an assault with intent to commit a rape*.

The consent of a female of that age, or even her aiding the prisoner's attempt, is *no defence*.

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*Hays v. The People.*

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**ERROR** from the Schenectady general sessions, where Hays was convicted of an assault with intent to commit a rape on Maria Webb, a female under ten years of age.

He enticed her into the loft of a building, for the purpose of ravishing her; and was detected, while standing within five feet of her in a state of indecent exposure. There was no evidence that he touched her at any time. The presiding judge charged the jury as stated hereafter in the opinion of the court. The prisoner's counsel excepted, and, after judgment, sued out a writ of error.

*M. T. Reynolds*, for plaintiff in error.

*P. Potter*, (district attorney,) for the people.

*By the Court*, COWEN, J. There is no doubt of the prisoner's intent; and the only question is, whether he had proceeded in it so far as to warrant the court in submitting to the jury whether he was guilty of an assault. The charge was, that if they believed the prisoner enticed Maria to the loft for the purpose of ravishing her, she being under ten years of age, the offence of an assault with intent to commit a rape was established.

The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant consented to, or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor, any more than if he had consummated his purpose. The case submitted to the jury, was that of a man having another in his power, and within reach, threatening and exerting the means to accomplish meditated violence upon her person. This is clearly an assault within all the authorities. An assault is defined by these, to be an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person.

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Ingraham v. Hammond.

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There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient. (1 *Selw. N. P.* 27, *Am. ed. of 1839.* *Bull. N. P.* 15. 3 *Chit. Cr. Law*, 821, note (H.) *Am. ed. of 1836.*)

'The court below were clearly right, and the judgment should be affirmed.

Judgment affirmed.

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INGRAHAM vs. HAMMOND & MEAD.

In replevin, a plea of property in a third person is good, and entitles the defendant to have return thereof, without connecting himself with the right of such person, or making avowry.

DEMURRER to pleas. The declaration was in replevin, for *taking* a yoke of oxen. Hammond pleaded property in Mead, his co-defendant; and Mead the like plea, of property in Hammond. Each then pleaded various pleas of property in other persons, strangers to the suit. The pleas did not connect the defendants, or either of them, with the title set out, and each plea prayed a return of the property. 'The plaintiff demurred to all the pleas; and the defendants respectively joined in demurrer.

*H. M. Romeyn*, for plaintiff.

*A. J. Parker*, for defendants.

*By the Court*, COWEN, J. It has been long settled, and never questioned, that in replevin, the plea of property in a third person is good, and entitles the defendant to have return thereof, without his connecting himself with the right of such person, or making avowry. (27 *Henry* 8, 21, *pl.* 11. *Butcher v. Porter*, 1 *Salk.* 94. *Parker v. Mellor*, 1 *Ld. Raym.* 217. *Carth.* 398, *S. C.* *Harrison v. M'Intosh*, 1 *John. R.* 380, 384. *Prosser v. Woodward*,



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21 *Wend.* 209, 210.) The reason for it is thus given in Salkeld; "Whether the property be in a defendant or a stranger, the defendant ought to have a return, because he had the possession, which was illegally taken from him by the replevin." The case also decides, that there need not be an avowry for a return. The same case is reported in *Carth.* 243, and 1 *Show.* 400, both agreeing in their reasons with Salkeld. They differ only, in Salkeld saying that the plea was in abatement; the others say it was in bar; but the court appear, in each report, to have agreed it might be either. The form of the plea, which was property in a third person, is set out in Shower; and the pleas of the defendants, in the case at bar, will be found an exact translation of it, *mutatis mutandis*. Both the form and the rules thus laid down, have ever since been followed. One important general distinction was this, as stated by Carthew, after saying there need be no avowry: "The difference is, where the plea goes to the very point of the writ, as here, and where it is only collateral matter, as *prist in auter lieu*, for there a suggestion must be made in nature of an avowry, *pro retorn. habend.*, because the plea itself doth not contain any matter for a return; for though it may be true, yet the taking may be tortious." The same distinction is laid down, in more general terms, by Salkeld, and may be collected from Shower. To these cases may be added, *Salkold v. Skelton*, (*Cro. Jac.* 519; 2 *Roll. R.* 64, *S. C.*;) *Wildman v. North*, (2 *Lev.* 92; 1 *Vent.* 249, *S. C.*;) *Presgrove v. Saunders*, (6 *Mod.* 81; 2 *Ld. Raym.* 984, *S. C.*;) *Cross v. Bilson*, (2 *id.* 1016, 1020, 1022.) See also *Gilb. Replev.* 212, *Lond. ed.* of 1794, and *Wilkins. Replev.* 48.

Judgment for defendants.

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Duffy v. The People.

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## DUFFY vs. THE PEOPLE.

The constitution of this state, (*Art. 7th, § 2,*) relating to the right of trial by jury, &c. has no reference to proceedings intended merely to *prevent* the commission of offences.

A statute authorizing a magistrate, summarily and without jury, to convict one who has abandoned his family, of being a disorderly person, and to require from him sureties for good behaviour, is not unconstitutional.

ERROR from the New-York common pleas. The suit in the court below was against Duffy, on a recognizance taken before a justice of the peace, conditioned for the good behaviour of one Dayly, towards the people, &c. for one year. The recognizance recited, that Dayly had been convicted of being a *disorderly person*, viz. one who had neglected to provide for his wife, &c. It was taken May 18th, 1838. Duffy pleaded, among other things, that Dayly's conviction was by the justice alone, without a jury, contrary to the 7th Art. of the constitution of this state. Demurrer to this plea, and joinder. Judgment was rendered for the people in the court below; whereupon Duffy sued out a writ of error.

*C. O'Connor*, for plaintiff in error.

*A. L. Robertson*, contra.

*By the Court*, COWEN, J. The constitution, in its language concerning trial by jury, and courts proceeding according to the course of the common law, (*Art. 7, § 2,*) evidently has reference to cases wherein an issue is joined, which may be followed by verdict and judgment; not to that class of cases wherein the law has interposed means of preventive justice. The statute of 1833, (*ch. 11, § 7,*) merely adds one to the class of disorderly persons, and authorizes a single magistrate to deal with him in a summary way, as all others of this class have long been dealt with; not to punish him for a crime committed, but require him

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Curtis v. Monteith.

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to give security that he will not commit a crime. This and the like, are not cases in which the trial by jury has ever been used.

Judgment affirmed.(a)

(a) See *Matter of Newell Smith*, (10 Wend. 449.)

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### CURTIS and another vs. MONTEITH and others.

Where an action, though in form *ex delicto*, is, in fact, founded on a joint contract of the defendants and a person offered by them as a witness, (e. g. case, against common carriers,) the rule that joint tort-feasors are not liable to contribute, does not apply, and the witness is incompetent.

The rule, that a release by one of several joint creditors, discharges the debtor as to all, does not apply to releases by partners, *inter se*.

Four of several partners were sued, and, on the trial, a member of the firm not sued, was offered as a witness for the defendants; *held*, that a release by two of the latter, did not render the witness competent, as it still left him liable to contribution in respect to the other members of the firm.

TRESPASS on the case, against the defendants, Monteith, Joy, and two others, as common carriers, tried at the Oneida circuit, October 9th, 1840, before GRIDLEY, C. Judge. The defendants were members of a transportation company consisting of more than twelve persons, and including B. C. Brainard, whom two of them, viz. Monteith and Joy, (who defended separately,) offered as a witness on the trial. He was objected to by the plaintiffs, as interested; and the judge decided he was incompetent. Monteith and Joy then executed a release to him, "of all liability or responsibility on his (Brainard's) part, to them or either of them, by reason of any damages or costs to be recovered against them or either of them, in this suit, or by reason of any costs or expenses incurred by them in prosecuting, &c., or of any claim which they, or either, &c. had, or might hereafter have against said Brainard by reason of the commencement, &c. of this suit." Brainard was again offered by them, and objected to as interested. The judge decided that he was still incompetent, and he

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Curtis v. Monteith.

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was excluded ; whereupon a verdict was rendered against all the defendants. The defendants, Monteith and Joy, now move for a new trial on a case.

*M. T. Reynolds*, for defendants.

*J. A. Spencer*, for plaintiffs.

*By the Court*, COWEN, J. The action, though in form *ex delicto*, was, in fact, founded on the joint contract of the defendants, and the witness stood liable to contribute, both in respect to damages and costs. The rule that one of several joint tort-feasors is not compellable to contribute does not apply.

The release by Monteith and Joy, was not effectual to discharge Brainard from his liability to contribute, in respect to the other members of the firm. To render him competent, all the partners should have released. The rule that a release by one of several joint creditors discharges the debtor as to all, does not apply to releases by partners *inter se*. (*Bill v. Porter*, 9 Conn. Rep. 23.)

New trial denied.(a)

(a), & the cases cited in Cowen & Hill's Notes to 1 Phill. Ea. pp. 111, 266, 1737, & seq.

END OF MAY TERM.



## DECISIONS OF CASES

ARGUED AT THE

## SPECIAL TERMS,

MAY AND JUNE, 1841.

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### CRITTENDEN vs. CRITTENDEN.

In ejectment, the declaration contained three counts for the same premises, in one of which the plaintiff claimed an estate in *dower* as widow, and in the others an estate *in fee* as heir at law, to all of which the defendant pleaded one plea of not guilty; and the plaintiff had a verdict on the count claiming dower, and the defendant on the other counts: *Held*, that the plea might be regarded as making a several issue on each count, so as to entitle the defendant to costs on the matters found in his favor.

Whether this rule would prevail, where the plaintiff sets up *the same title* under several counts claiming different degrees of interest in the land, and the defendant succeeds as to some of them, or, where there are counts upon the title of several plaintiffs, some of whom succeed, and the others fail, *quere*.

**EJECTMENT.** The declaration contained three counts for *the same premises*. By the first count the plaintiff claimed an estate in *dower* in the land, as the *widow* of her deceased husband; and in the two other counts she claimed an estate *in fee*, as *heir at law*. The defendant pleaded one plea of not guilty to the whole declaration; and on the trial the jury found a verdict for the plaintiff on the first count, (for dower;) and for the defendant on the other counts. Most of the costs of the defence were incurred in resisting the plaintiff's claim to an estate in fee in the land.

*A. Worden*, for the defendant, moved for costs against the plaintiff on the second and third counts of the declara-

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Crittenden v. Crittenden.

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tion; and that those costs be set off against the plaintiff's costs on the first count.

A. Gibbs, for the plaintiff, opposed the motion.

*By the Court*, BRONSON, J. This motion is resisted on the ground that the statute only provides for cases where there shall be "*several* issues joined in any cause;" (2 R. S. 617, § 26;) and here there is only *one* plea, not guilty, to the whole declaration. But in a case like this, I think the plea may be regarded as making a several issue upon each count. (See *Seymour v. Billings*, 12 Wend. 285; *Rogers v. Arnold*, *id.* 288, note; 1 Chit. Pl. 449, ed. '37.) The plaintiff, in the several counts, not only demanded *different estates* or interests in the land, but she claimed by *distinct and independent titles*. Under the first count, she demanded a life estate as tenant in dower; and under the others, she claimed an estate in fee as heir at law. Here were *two distinct causes of action*, and the evidence in relation to them must have been substantially different on both sides. If the plaintiff had been defeated in a separate action upon either of these titles, it probably would have been no bar to a subsequent action upon the other title.

If we regard the plea as making a several issue upon each count, the case then comes directly within the second subdivision of the section which has been mentioned. "When there are *two or more distinct causes of action in separate counts*, the plaintiff shall recover costs on those issues which are found for him; and the defendant on those which are found in his favor."

It is unnecessary to inquire, whether the plaintiff will be liable to costs where *the same title* is set up under several counts claiming different degrees of interest in the land, as an undivided share, or an estate for years, for life, or in fee; or where there are counts upon the title of several plaintiffs, some of whom succeed and others fail. It will be time enough to dispose of these and other questions of the same nature when they arise.

Motion granted.

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Belding v. Burlingham.

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## BELDING vs. BURLINGHAM.

On a writ of error to this court from the court for the correction of errors, the prevailing party is not entitled to charge *by the folio*, for copies of the points furnished on the argument in the latter court, but only the expense of *printing* them.

On appeal from the taxation of costs the question was, whether on a writ of error to this court from the court for the correction of errors, the prevailing party was entitled to charge *by the folio* for copies of the points delivered to the members of the court, or whether he should only be allowed *the expense of printing*. The taxing officer had allowed for copies by the folio, amounting to \$70.

*M. T. Reynolds*, for the plaintiff, insisted, that after a charge by the folio for drawing the points, and for copies to be signed by counsel and for the printer, the party was only entitled to be paid the expense of printing the copies furnished to the members of the court. He said that although the judges might have taxed copies by the folio *with the consent of counsel*, (see *Ætna Ins. Co. v. Tyler*, 18 *Wend.* 658, *note*,) yet the point had never been decided by this court. In the court of chancery it had been settled that the party could only charge the printer's bill. (*Waller v. Harris*, 7 *Paige*, 479.)

*O. Allen*, for the defendant, said it was the uniform practice of the taxing officers in this court, to allow by the folio for the points furnished to the members of the court for the correction of errors.

*By the Court*, BRONSON, J. Although this question seems never to have been decided in this court, it is settled in the court of chancery that the party is only entitled to the expense of printing, for the necessary copies of the points furnished to the court and counsel on the argument. There



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The People v. The Supervisors of New-York.

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is no difference in principle between cases upon appeal and those on writs of error, so far as relates to this question, and the practice of the taxing officers should be the same in both courts. We have considered the matter, and are of opinion that the chancellor has laid down the true rule. There must, therefore, be a re-taxation.

Motion granted.

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THE PEOPLE, *ex rel.* Phoenix, vs. THE SUPERVISORS OF THE  
CITY AND COUNTY OF NEW-YORK.

The revised statutes, as well as the act of 1821, providing for an annual salary to the district attorney of New-York, preclude that officer from a right to compensation *extra* the salary, on account of suits brought by him for fines and forfeited recognizances.

A salary officer cannot rightfully claim compensation *extra* his salary for performing a new duty, or one imposed by the legislature since the salary was provided.

A board of supervisors, by auditing and paying part of a claim presented, is not thereby precluded from contesting the residue even upon a principle which would show the former allowance to have been improper.

A mandamus will not lie to a board of supervisors, to control them in the exercise of their discretion as to the amount at which an account presented shall be audited.

Where the claim of a district attorney is presented to the board, consisting of costs for prosecuting recognizances, &c. and the costs have been taxed as against the persons sued, *quere* whether such taxation is conclusive upon the county.

THE return to an alternative *mandamus* presented the following facts: The relator was *district attorney* of the city and county of New-York for three years—from May, 1835, to 1838. His salary, which had been fixed by the common council at \$3000 per annum, had been regularly paid. In addition to the prosecution of persons charged with crimes and misdemeanors, he brought a great number of suits upon forfeited recognizances, and for the recovery of fines imposed upon jurors. In many cases, he failed to collect any thing from the persons sued, and in other in-

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The People v. The Supervisors of New-York.

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stances, the amount of the fine or recognizance was paid without suit. In December, 1838, the relator presented to the supervisors an account against the county, in which he charged \$2,50 in each case where the money was paid without suit; and charged a bill of costs in all cases where the money had not been collected from the person sued. He also charged disbursements, and his account amounted in the aggregate to over \$18,000; against which he gave credit for the moneys he had collected and received for fines and on recognizances, amounting to over \$11,000; and claimed a balance of nearly \$8000. But this balance was afterwards reduced to \$6312,46.

The supervisors referred the account to a committee, before which the relator appeared from time to time. The committee allowed the relator all his disbursements, and such other charges as they deemed proper, and struck a balance in his favor of \$281,04; and the supervisors, on the report and recommendation of the committee, passed a resolution on the 9th May, 1839, as follows: "*Resolved*, that the account of Thomas Phoenix, late district attorney, hereunto annexed, be and the same is hereby audited, and the balance fixed at \$281,04, which sum the comptroller is directed to pay by warrant on the treasurer in full of said account." This sum the supervisors have always been ready to pay.

In July, 1840, the relator sued out an alternative writ of *mandamus*, which, after reciting that the sum of \$6312,46 was due to the relator for costs, &c. commanded the supervisors to audit, collect and pay over that amount, or show cause, &c. The return stated, among other things, that no part of the sum claimed was due to the relator.

*H. M. Western*, for the relator, moved for a peremptory *mandamus*.

*P. A. Cowdrey*, for the supervisors, opposed the motion.

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The People v. The Supervisors of New-York.

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*By the Court, BRONSON, J.* The supervisors have returned, among other things, that no part of the sum claimed is due; and the relator, instead of traversing, has, in effect, demurred to the return. But he insists that this part of the return should be regarded as a mere inference from the other matters set forth by the supervisors, and not as the allegation of a distinct substantive fact. Although I am not prepared to say that this argument can be supported, I shall nevertheless give it all the force of truth for the purpose of considering the other questions which the case presents.

Including salary, the relator has already received eighteen thousand dollars from the county of New-York for his three years' services. He has also received costs in those cases where costs were collected from the persons sued, probably amounting to several thousand dollars more. Although this may be regarded as an ample compensation for the services rendered, it is still no answer to the present application, if by law he is entitled to the further sum of six thousand dollars which the writ demands. The examination of his title to that sum may involve two general considerations: *first*, whether the salary fixed by the common council was the legal measure of his compensation; and *second*, whether the relator's account has not been audited and adjusted pursuant to law, and beyond the power of this court to control the matter by *mandamus*.

I. Formerly, all district attorneys were compensated by *fees*, and their accounts were audited in the court of exchequer and paid from the *state treasury*. (2 R. L. 21, and 1 *id.* 415, § 3.) By the act of 1818, the fees were modified, and their accounts were made a charge upon the *county*, to be assessed and collected by the supervisors as a part of the contingent expenses of the county. (*Statutes of 1818, p. 306, ch. 283.*) Then came the act of March 16, 1821, which provided that the district attorney of the county of *New-York* should receive an annual *salary* of three thousand dollars, "*in lieu of the compensation which the county of New-York is now required to pay him;*"

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to which a further clause was added, "that it shall not thereafter [the passing of the act] be obligatory upon the supervisors of said county to allow *any of the accounts of the said district attorney for services thereafter to be rendered*, nor shall it be obligatory upon the said county to pay any such accounts, nor to pay him *any other compensation whatsoever for any services which he may thereafter render*." (*Statutes of 1821, p. 91, § 1.*) This statute plainly covers the whole ground, and the relator must get rid of it before he can make title to any compensation beyond his salary.

The act of 1821 was so far modified by the revised statutes, as to authorize the common council of the city of New-York to fix the salary of the district attorney at a sum not less than two thousand five hundred, nor more than three thousand five hundred dollars. (1 *R. S.* 383, § 95.) This touched nothing but the amount of the salary, and the mode of fixing it. As to every thing else, the act of 1821 remained in full force. But it is said, that although the act was not, in terms, repealed by the general repealing statute, yet it was, in effect, abrogated by the 10th, 11th and 14th sections of that statute. (2 *R. S.* 779.) I have read those sections with attention, without being able to perceive that they have any bearing on the question.

But should it be conceded that the act of 1821 has been repealed, I do not see how it can aid the relator. The revised statutes provide, that "the district attorney of the city and county of New-York shall receive *for his services* an annual salary, not less, &c., to be fixed and paid by the common council of that city." (1 *R. S.* 383, § 95.) The language is general, including *all* services, and there is nothing to limit or qualify its influence. We may just as well except criminal prosecutions from the operation of this provision, as we can except suits for fines and upon forfeited recognizances. The justice of this remark is the more apparent, from the fact, that the remaining clause of the same section contains just such a qualification in rela-

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*The People v. The Supervisors of New-York.*

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tion to other district attorneys, as the counsel wishes to have understood in the clause relating to the district attorney of New-York. "The district attorneys of all the *other* counties in the state shall be paid for the services *in conducting criminal prosecutions*, by their respective counties," &c. The legislature evidently intended, that the salary to be paid by the common council should be the only charge upon the county of New-York for the services of its district attorney. The fees which he receives in civil suits he may retain, in addition to the salary; but a failure to collect those fees from the persons sued will not authorize him to charge them to the county. (*See The People v. Van Wyck*, 4 Cowen, 260.) The act of 1839, (*Statutes of 1839*, p. 317,) which gives costs to the New-York district attorney in certain cases, cannot aid the relator, because it was passed since he left the office.

One or two arguments for the relator on this branch of the case remain to be noticed. By the third section of the act of 1821, fines and forfeited recognizances in New-York were to be collected by the *sheriff* of that county. (*Statutes of 1821*, p. 91.) This provision was left in force when the laws were subsequently revised. (2 R. S. 487, § 43.) But this section was repealed soon after the new code took effect, and three new sections were substituted, which authorized the *district attorney* to sue for the fines of defaulting jurors. (*Statutes of 1830*, p. 399, § 52.) It is said that this statute imposed a new duty upon the district attorney, and that he is consequently entitled to compensation beyond the amount of his salary. The language of the statute is, that the district attorney *may* proceed to collect the fines by actions of debt to be brought in the court of common pleas, and that judgments may be entered for the amount of the fine and *costs of suit*. If this must be understood as an imperative provision, it is not quite clear that it imposed a burden upon the district attorney. He might be very willing to sue for fines, and take the chance of collecting costs from the persons sued. But should it be conceded that the statute imposed a new

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The People v. The Supervisors of New-York.

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and onerous duty upon the district attorney, it does not follow that he is entitled to any additional compensation on that account. By charging the attorney with the duty of suing for fines, without making provision for the payment of costs, the legislature has, in effect, declared, that the salary of the officer is to be deemed the compensation for these, as well as for other services. It is impossible for a salary officer to make title to an increased compensation, on the sole ground that a new duty has been cast upon him by the legislature. There are few state officers, whether executive or judicial, who have not often been charged with new duties, and yet no one has, I presume, ever thought that this gave him a legal title to increased compensation. Whether the pay shall be increased with the burden, is a question which addresses itself to the legislature. The courts have nothing to do with it.

Another argument is, that the supervisors, by allowing a part of the relator's account, have admitted his right to these costs, and cannot now resist the payment of the balance which he claims. But the voluntary payment of a part of a demand cannot be construed into an admission of liability for the residue, where, as in this case, such liability was expressly denied.

II. Should it be conceded that the relator is entitled to something beyond his salary, I see no ground on which we can interfere by *mandamus*. The supervisors have not refused to audit the account. They have only exercised their discretion as to the extent of the allowance, and in such a case a *mandamus* will not lie. (*The People v. Supervisors of Albany*, 12 John. R. 414. *Hall v. Supervisors of Oneida*, 19 id 259. *The People v. Supervisors of Dutchess*, 9 Wendell, 508.) If the supervisors have gone too far, in disallowing one third of the amount claimed, the relator has no remedy in this form of proceeding, if he has in any other.

But it is said that the fee bill governed the amount of the relator's compensation, and that the supervisors had no discretion in the premises. If the relator's costs had been

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Maury v. Van Arnum.

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plaintiff was regular in disregarding the plea for the want of an affidavit of merits, but the defendants are entitled to relief on another ground.

Ordered accordingly.

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MAURY and another vs. VAN ARNUM.

Where there are several plaintiffs in a cause, it is no objection to an affidavit therein that the christian name of one of them is omitted in the title.

If there be several plaintiffs or defendants in a cause, the papers may be entitled A. B. and another or others, according to the fact.

Where a party moved to strike out pleas as *false* and *frivolous*, his notice not specifying any ground for the motion, and his affidavits alleging only that the pleas were *false*; *held*, he could not avail himself of the *frivolousness* of the pleas.

Where a plea has been duly verified pursuant to the first rule of May term, 1840, this will be a sufficient answer to a motion to strike it out as *false*; no new affidavit being required in such case.

*E. Pearson*, for the plaintiffs, moved to strike out two special pleas put in by the defendant, on the ground that they were both *false* and *frivolous*. The notice did not state on what ground the motion would be made, but the affidavits alleged that the pleas were *false*.

*D. Burwell*, for the defendant, objected that the papers could not be read, because the christian name of one of the plaintiffs was not mentioned in the title of the cause. He said the plaintiffs, who made the affidavits, could not be indicted for perjury on account of this defect.

*By the Court*, BRONSON, J. Where there are several persons, plaintiffs or defendants, in a cause, the papers may be entitled A. B. and another or others, as the case may be; and if the affidavits are false, I entertain no doubt that the persons making them may be convicted of perjury. You must answer the motion.

*Burwell* then objected, that the plaintiffs could not move

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Aeby v. Rapelyea.

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on the ground that the pleas were *frivolous*, because that ground was not maintained in the papers: and as to the alleged *falsity* of the pleas, he read an affidavit showing that the pleas, when served, were duly verified by affidavit pursuant to the first rule of May term, 1840. (22 *Wendell*, 644, *note*.)

BRONSON, J. If the plaintiffs intended to move on the ground that the pleas were *frivolous*, they should have said so in the notice of motion—especially in a case like this, where the defendant was informed by the affidavits, that the motion was to be made on the ground that the pleas were *false*.

The other ground for moving must also fail. When the pleas have been duly verified, pursuant to the first rule of May term, 1840, there can be no use in a motion to strike them out on the ground of *falsity*. We do not try this matter upon affidavits, and it is enough that the defendant has once sworn to the truth of the pleas.

Motion denied.

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AEBY vs. RAPELYEA and others.

Where the maker and endorsers of a note are sued together under the act of 1832, and a verdict passes in favor of all the defendants, without any severance of the action, only one judgment can be perfected against the plaintiff.

But if there be a severance either before or on the trial, a defendant who succeeds may perfect a separate judgment, without reference to his co-defendants.

MOTION to set aside judgments. The defendants, who were the maker and several endorsers of a promissory note, were sued together under the act of 1832, *ch.* 276. Each of the three parties defended by his own attorney, and a verdict having passed in favor of all the defendants, without any severance of the action, they taxed costs and



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Maury v. Van Arnum.

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plaintiff was regular in disregarding the plea for the want of an affidavit of merits, but the defendants are entitled to relief on another ground.

Ordered accordingly.

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**MAURY and another vs. VAN ARNUM.**

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*By the Court*, BRONSON, J. Where there are several persons, plaintiffs or defendants, in a cause, the papers may be entitled *A. B. and another* or *others*, as the case may be; and if the affidavits are false, I entertain no doubt that the persons making them may be convicted of perjury. You must answer the motion.

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BRONSON, J. If the plaintiffs intended to move on the ground that the pleas were *frivolous*, they should have said so in the notice of motion—especially in a case like this, where the defendant was informed by the affidavits, that the motion was to be made on the ground that the pleas were *false*.

The other ground for moving must also fail. When the pleas have been duly verified, pursuant to the first rule of May term, 1840, there can be no use in a motion to strike them out on the ground of *falsity*. We do not try this matter upon affidavits, and it is enough that the defendant has once sworn to the truth of the pleas.

Motion denied.

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AEBY vs. RAPELYEA and others.

Where the maker and endorsers of a note are sued together under the act of 1832, and a verdict passes in favor of all the defendants, without any severance of the action, only one judgment can be perfected against the plaintiff.

But if there be a severance either before or on the trial, a defendant who succeeds may perfect a separate judgment, without reference to his co-defendants.

MOTION to set aside judgments. The defendants, who were the maker and several endorsers of a promissory note, were sued together under the act of 1832, *ch.* 276. Each of the three parties defended by his own attorney, and a verdict having passed in favor of all the defendants, without any severance of the action, they taxed costs and

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Carr v. Richardson.

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perfected three several judgments against the plaintiff, which

*I. Harris*, for the plaintiff, now moved to set aside.

*P. Gansevoort*, contra.

*By the Court*, BRONSON, J. Where there is a severance of the action, either before or on the trial, a defendant who succeeds may perfect a separate judgment against the plaintiff, without reference to the co-defendants. (*Statutes of 1832*, p. 489, § 4.) But where, as in this case, all of the defendants succeed on one trial without a severance of the action, only one judgment should be perfected against the plaintiff.

Motion granted.

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CARR vs. RICHARDSON.

The first rule of May term, 1840, as to verifying pleas, only applies to cases where it appears that the *whole* cause of action is on one or more written instruments or records. Hence, where the declaration contained two special counts on a promissory note, together with the money counts, and no notice was given that the note was the *only* cause of action relied on; *held*, that a plea of the general issue to the whole declaration, not verified according to the above rule, could not be disregarded.

VERIFYING pleas. The declaration, contained two special counts on a promissory note, and the common money counts. A copy of the note was served with the declaration, but without a notice that the note was the only cause of action on which the plaintiff relied. (*See 1st rule of May term, 1840, 22 Windell, 644, note.*) The defendant pleaded the general issue to the whole declaration, without accompanying it by an affidavit of merits, and for the want of such affidavit, the plaintiff disregarded the plea and proceeded to judgment, which

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Bromley v. Town.

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*E. A. Doolittle*, for the defendant, now moved to set aside for irregularity.

*T. D. James*, for the plaintiff, insisted, that inasmuch as the two special counts severally described a written instrument, the plea, so far as it went to those counts, should have been accompanied by an affidavit of merits.

*By the Court*, BRONSON, J. The plaintiff cannot split up the action in this way. The first rule of May term, 1840, only applies to cases where it appears that *the whole* action is on one or more written instruments or records.

Motion granted.

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BROMLEY vs. TOWN.

A defendant cannot be held to bail without a judge's order, in an action on contract, (e. g. a promise of marriage,) where the damages can only be rendered certain by the verdict of a jury.

The revised statutes have changed the rule which prevailed when the case of *Bunting v. Brown*, (13 John. R. 425,) was decided.

HOLDING to bail. The defendant was arrested and held to bail in the sum of \$2000, on a *capias ad respondendum*, in which the *ac etiam* clause was "upon a *promise of marriage*," but there was no judge's order to hold to bail. On the defendant's application, the recorder of Hudson, after an order to show cause, &c. made an order discharging the defendant out of custody, on his filing common bail, or endorsing his appearance on the *capias*.

*K. Miller*, for the plaintiff, appealed from the recorder's order, and moved that the same be vacated.

*Sutherland & McClellan*, for the defendant, opposed the motion.

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Wolverton v. Wells.

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*By the Court, BRONSON, J.* Although this is an action upon contract, the damages are neither certain, nor can they be reduced to certainty in any other way than by the verdict of a jury; and in such cases the defendant cannot be held to bail without a judge's order. (2 R. S. 348, § 7, 8.) The statute has changed the rule which prevailed when the case of *Bunting v. Brown*, (13 John. R. 425,) was decided.

The act to abolish imprisonment for debt, (*Statutes of 1813, p. 396,*) does not touch the question. The second section merely excepts actions upon promises to marry from the operation of the first section, and leaves the question of bail in those actions as it stood before. As there was no order to hold to bail, the defendant was properly discharged from custody.

Motion denied.

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WOLVERTON vs. WELLS.

Where the defendant served papers for a motion to change the venue from the county of S. to the county of M., together with an order to stay proceedings until the decision of the motion; *held*, that the plaintiff, within the time specified in the 23d rule, might nevertheless amend his declaration, by changing the venue to the county of A.

In such case, if it appear, on the motion, that the plaintiff has a sufficient number of witnesses to retain the venue in the county to which he has changed it by his amendment, and the defendant has had time to serve new papers since the amendment, but has omitted so to do, the motion will be denied.

VENUE. Amendment. Issue was joined on the 24th of April last, and on the same day, the defendant served papers for a motion to change the venue from the county of *Saratoga* to the county of *Montgomery*, with an order to stay proceedings until the motion should be decided. On the 28th of April, the plaintiff amended his declaration, under the 23d rule, by changing the venue to the county of *Albany*. The defendant thereupon served papers for a

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Wolverton v. Wells.

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motion to set aside the amended declaration, for irregularity. Both motions were now made by

*A. Sheldon & M. T. Reynolds*, for the defendant.

*I. Harris*, contra, insisted that the plaintiff was regular, and he read an affidavit, showing that the plaintiff had a sufficient number of witnesses in *Albany*, to retain the venue in that county.

*By the Court*, BRONSON, J. The order to stay proceedings, for the purpose of moving to change the venue, stayed the plaintiff from "giving notice and subpoenaing witnesses for the trial," but left him the full liberty of "taking any other step" in the cause. (*Rule 94.*) He was consequently regular in amending the declaration, pursuant to the 23d rule—twenty days not having elapsed after service of the plea. This view of the case disposes of both motions. The amended declaration cannot be set aside, because the amendment was regularly made, and the venue cannot be changed to Montgomery, because the plaintiff has witnesses enough in Albany to retain the venue in that county.

If the defendant could make a better case for changing the venue from Albany, than he has for changing it from Saratoga, where it was originally laid, he had time enough, and should have served additional papers. In this case, the change of venue by amendment has worked no injury to the defendant. Should a case arise differing in its circumstances from the present one, we will take care that the defendant suffers no wrong

**Motions denied.**



**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**S U P R E M E C O U R T**  
**OF THE**  
**S T A T E O F N E W - Y O R K ,**  
**IN JULY TERM, 1841.**

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**THE PEOPLE vs. ALEXANDER McLEOD.**

one duly committed upon a regular indictment for murder, cannot be discharged upon *habeas corpus*, by proving his innocence merely, however clear the proof may be ; but must abide a trial by jury.

The protection of the English *habeas corpus* act (31 Car. 2, c. 2) against unlawful imprisonment, went no farther than the enlargement of the prisoner on bail, if the offence were bailable. (*See post*, note (c).)

The provision in the revised statutes, (2 R. S. 471, § 50, 2d ed.) allowing a party on *habeas corpus* to deny the truth of the return, and allege matters showing that he is entitled to be discharged, &c. was not intended to give him the right of summary trial as to the question of guilt or innocence ; but merely to enable him, by evidence *aliunde* the return, to dispute the fact of his being detained on the process or proceeding set forth, or to impeach it for lack of jurisdiction, or, *semble*, to show that by some subsequent event, (e. g. a pardon, reversal of judgment, &c.) it has ceased to be lawful cause of detention.

More evidence of innocence, cannot be used on *habeas corpus* as an argument for letting the prisoner to bail, if the application is *after indictment* found.

And even where the application to bail is before indictment, the right of inquiry as to guilt or innocence is limited to the depositions or proofs on which the commitment was ordered.

*Semble*, that under the statute 31 Car. 2, c. 2, where the warrant of arrest or commitment contained a specific charge of an offence not bailable, the



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The People v. McLeod.

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prisoner on *habeas corpus* was not entitled to any relief whatever. (*And see post, note (e).*)

Several English cases on *habeas corpus* to admit to bail, reviewed and commented on.

Warrants of arrest and commitment need not contain the facts on which the charge made is predicated; but are sufficient, in this respect, if the nature of the offence be clearly specified. (*See post, note (e).*)

The court have no power to order the entry of a *nolle prosequi* upon an indictment. This power at common law, could only be exercised by the *attorney general*; and, *it seems*, we have no statute depriving him of it.

But a *district attorney* cannot enter a *nolle prosequi* without leave from the proper court.

An alien, in whatever manner he may have entered our territory, is amenable criminally for offences committed here.

A state of peace, and the continuance of treaties, are to be presumed by every court, until the contrary be shown; and this is *presumptio juris et de jure*, until the national power of the country where the court sits officially declares the contrary.

To constitute public war, at least two nations in their corporate capacities, are essential parties.

The three sorts of war, viz. *public*, *private* and *mixed*, defined and considered.

War is none the less public, though it be *unsolemn*, i. e. carried on under special declaration, confining hostilities to specified persons, places or things; and, like *solemn* or perfect war, to be lawful, it must be authorized by the war-making power.

A subject of Great Britain, who, under directions from the local authorities of Canada, commits homicide in this state, in time of peace, may be prosecuted in our courts, as a murderer; even though his sovereign subsequently approve his conduct, by avowing the directions under which he did it as a lawful act of government.

A nation can only exercise the right of war within its own territory, or that of its enemy, or in one which is vacant; and this whether the war be *public* or *mixed*.

The right of using violence in self defence, only arises where one is forcibly assailed. To excuse homicide in self defence, the act must not be premeditated.

The right of resorting to force, upon the principle of self defence, does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury.

An order of a nation at war, for the destruction of the life or property of its enemy within the territory of a neutral power, is void, and affords no protection to persons acting under it.

A sovereign has no right to compel his subject to enter a neighboring country and commit an *unlawful* act, either in time of peace or war.

Where a citizen of Canada has been arrested for a crime committed in this state, which his sovereign subsequently approves, the jurisdiction of our

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courts in respect to him is not superseded by the fact that the whole matter has become the subject of diplomatic negotiation between the United States and Great Britain.

Whether an actual exertion of the treaty-making power as between the two nations, could deprive our courts of jurisdiction in such case, *quære*.

The rule in England, that in cases of hostile invasion by private persons, the common law courts can take no jurisdiction of them, rests on a distribution of judicial power unknown to our law.

Homicide is presumed malicious until the contrary appear; and whether justifiable or excusable upon the facts, as an act of war, or self defence, &c. is a question for the jury to determine.

ON *habeas corpus* to discharge the prisoner, Alexander McLeod, from the custody of the sheriff of Niagara county, by whom he was confined in jail. The prisoner having been brought before the court, it appeared by the sheriff's return to the writ that he was imprisoned on an indictment for the murder of Amos Durfee, found by the grand jury of that county; that he had been arraigned at the oyer and terminer held there, and, after pleading not guilty, was in due form committed for trial. The indictment, which was annexed to the return, sufficiently charged the crime upon the prisoner, alleging it to have been committed at a certain town within the county of Niagara.

On the side of the prisoner the following affidavit was read:

"SUPREME COURT.

Alexander McLeod	}	City and County of New-York, ss.
ads.		
The People.		

Alexander McLeod, the defendant in this cause, being duly sworn, doth depose and say, that he has read the return of the sheriff of the county of Niagara to the writ of *habeas corpus*, on which this deponent has been brought into this honorable court, and in relation to that return and the facts therein contained, this deponent says:

That in the month of December, 1837, and deponent believes about the middle of said month, a body of men, in number, as deponent believes, about two or three hundred, proceeded from the state of New-York and took forcible and hostile possession of Navy Island, in the Niagara river

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and lying within the province of Upper Canada, and there organized and defended themselves, in a warlike manner against the lawfully constituted authorities of the said province and against the dominion of her majesty the queen of Great Britain, and made war, by the discharge of cannon and in other ways, upon her majesty's subjects at Chippewa in said province.

That the said occupants of Navy Island, as deponent is informed and believes to be true, were to a considerable extent composed of citizens of the United States, and were commanded by Rensselaer Van Rensselaer, one of such citizens.

That, as said deponent is informed and believes to be true, the said invaders were supported with provisions and arms and whatever else they had for the purpose of the said invasion chiefly, and deponent believes exclusively, from the United States and by citizens or residents thereof.

That the object of this invasion of her majesty's territory, as the same was then proclaimed, was to make a revolution in the said province, to cause the same to be separated from the government of Great Britain, and to erect it into a new and independent nation by force.

That in order to repel the said invasion and to prevent the said dismemberment of the British dominions, an army of about 2500 strong was assembled at Chippewa, by the authority and under the direction of the provincial government, as soon after the said invasion as was practicable.

That between this army, and the occupants of Navy Island, a frequent and sometimes a heavy cannonade was kept up.

That owing to the support which the invaders received from citizens and residents of the United States, the efforts on the part of the provincial authorities to dislodge them, were for a long time fruitless—they having retained the possession of the island until about the 16th day of January, 1838.

That on the 29th day of December, 1837, the steam boat *Caroline* proceeded from Black Rock or Buffalo, and having, as was alleged and believed, landed a quantity of mili-

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tary stores on Navy Island, commenced plying between the said island and Schlosser, in the state of New-York, transporting, as deponent has been informed and believes to be true, to the said island, men and provisions and implements of war for the support, aid and comfort of those who were there engaged in hostilities against the government of Great Britain.

That in the afternoon of that day, the said boat made two or three trips between the places last aforesaid.

That, as deponent is informed and believes to be true, the evening following, an expedition of several small boats and with armed men, was fitted out at Chippewa, by the direction of Col. Allen McNabb, (who was lawfully in command of her majesty's forces at the last named place, and vested with full authority to do so,) and commanded to take the said steam boat by force, wherever found, and to bring her in or destroy her.

That, as deponent has been informed and believes to be true, the persons who composed the said expedition and who were all subjects of her majesty, the queen of Great Britain, embarked in the said boats and started off in search of the Caroline, and found her fastened to the dock at Schlosser, and there made a hostile attack upon her by the use of swords and fire arms, and having expelled those who occupied her, destroyed her.

That, as deponent has been informed and believes to be true, the said attack was made between twelve and one o'clock of the morning of the 30th of December.

That, as deponent has been informed and believes to be true, while the persons who composed the said expedition against the Caroline were engaged therein, and acting under the orders they had so as aforesaid received from their superior and commanding officer, one Amos Durfee, a man then employed on the said steam boat, was killed, by being shot through the head with a pistol or musket ball.

That the said Durfee, as deponent has been informed and believes to be true, was slain by some one of the persons engaged in that expedition, and while engaged in accom

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plishing the objects thereof, and not by any other person, or in any other manner, or at any other time.

That this deponent is indicted in this cause for the crime of murder, in killing the said Durfee on the occasion aforesaid, and for being an accessory before the fact of such killing, with various individuals, but not for having any agency in the death of said Durfee at any other time or manner than as being one of the persons who composed and accompanied that expedition.

That, as deponent has been informed and believes to be true, the act of destroying the said steam boat Caroline, together with the manner in which the same was done, and the conduct of the persons engaged in it, including the killing of the said Durfee, have since been approved and adopted by the national government of Great Britain, as a necessary act of self defence, on the part of the authorities of the province of Upper Canada. And that, as this deponent has been informed and believes to be true, the federal government of the United States, immediately after the destruction of the Caroline, opened a correspondence with the government of Great Britain in relation thereto, and demanded reparation therefor, and that said correspondence has not yet been brought to a close.

And in confirmation of the foregoing statement, this deponent craves leave to refer to the published correspondence between the government of Great Britain and the United States, to the communications of the President of the United States to congress, and the accompanying documents, and to the annexed authenticated extract of a letter from Mr. Fox, her Britannic majesty's minister, to the secretary of state of the United States, together with the authenticated copy of the credentials of Mr. Fox to this government, also hereunto annexed; and he prays that they may be so taken as part of this, his answer, to the alleged cause of his detention and imprisonment, and as together furnishing the grounds of his claim to be discharged therefrom.

And this deponent further says, that he was not one of

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the persons engaged in the said expedition against the Caroline, nor did he accompany the same, or take any part in it, nor in the killing of the said Amos Durfee : and further saith not.

ALEXANDER McLEOD.

Subscribed and sworn in open }  
 court, &c. before me, }

W. P. HALLETT, *Clerk of Supreme Court.*"

A copy of the credentials of Mr. Fox, and also the extract from Mr. Fox's letter to Mr. Webster, secretary of state, mentioned in the affidavit, were annexed. The letter was dated March 12th, 1841, and the extract is as follows :

"Her majesty's government have had under their consideration the correspondence which took place at Washington in December last, between the United States secretary of state, Mr. Forsyth, and the undersigned, comprising two official letters from the undersigned to Mr. Forsyth, dated the 13th and 29th of December, and two official letters from Mr. Forsyth to the undersigned, dated the 26th and 30th of the same month, upon the subject of the arrest and imprisonment of Mr. Alexander McLeod, of Upper Canada, by the authorities of the State of New-York, upon a pretended charge of arson and murder, as having been engaged in the capture and destruction of the steam boat "Caroline," on the 29th day of December, 1837.

"The undersigned is directed, in the first place, to make known to the government of the United States, that her majesty's government entirely approve of the course pursued by the undersigned, in that correspondence, and of the language adopted by him in the official letter above mentioned. And the undersigned is now instructed again to demand from the government of the United States, formally, in the name of the British government, the immediate release of Alexander McLeod.

"The grounds upon which the British government make this demand upon the government of the United States, are

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these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her majesty's colonial authorities, to take any steps, and to do any acts, which might be necessary for the defence of her majesty's territories, and for the protection of her majesty's subjects; and that consequently those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the laws and tribunals of any foreign country."

Affidavits were read, on the part of the people, materially contradicting that of the prisoner, and tending to show, among other things, that he was present, participating in the attack on the Caroline; that he shot Durfee, and afterward declared he had done so, at the same time exhibiting a pistol, which, as he averred, had Durfee's blood still upon it.

*A. Bradley & J. A. Spencer*, for the prisoner, contended, that an order should be made discharging him, or directing a *nolle prosequi* on the indictment. They insisted, that as the supreme court had the right of ordering a trial of the cause at bar, it therefore had the right of ordering a *nolle prosequi*. (2 R. S. 330, § 1, 2d ed. *Id.* 609, § 54, and the revisers' notes to the latter, 3 *id.* 845.) The right to enter a *nolle prosequi*, previous to the revised statutes, was exercised by the attorney general or district attorney, on considerations of sound policy, and wise expediency; and the same reasons ought to influence the court in ordering its exercise now and in reference to the present case. This question is emphatically a question of political expediency in the highest sense, involving the cherished rights and interests of the nation; and all the consequences which would naturally flow from the decision, may, therefore, properly be considered.

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They then examined the power of the court under the act relating to writs of *habeas corpus*, to enquire into the cause of detention, &c.; (2 *R. S.* 465, *et seq.* 2d *ed.*;) affirming, that those powers had been greatly extended beyond what they were under the former laws of this state, or the laws of England; so that now, the court were authorized to look beyond the indictment returned, into all the facts of the case, and to dispose of the party "as the justice of the case might require." Indeed so solemn, and so far involving the entire merits of the case, is the present proceeding, that a writ of error lies upon the final decision by this court, to the court for the correction of errors; (2 *R. S.* 474, § 72, 2d *ed.*;) and thence, in a proper case in other respects, to the supreme court of the United States. (*Holmes v. Jennison*, 14 *Peters' Rep.* 540.)

The destruction of the *Caroline* was an act of public force, done by the command of the British government; and all the prisoner did, if any thing, was by command of his superior officer, and in obedience to the orders of his own government. He was bound to obey those orders; (*Vattel*, B. 1, c. 1, § 1, 2; *ch.* 3, § 26; *ch.* 4, § 38, 40 to 42, and also § 53;) and is, therefore, not responsible for acts done under them to any court of law whatever. (*Id.* B. 2, *ch.* 6, § 73, 4. B. 3, *ch.* 2, § 6, 7, 8, 9. *Burlam.* part 4, *ch.* 3, § 18, 19. *Rutherford*, B. 2, *ch.* 9, § 18.) Though there had been no declaration of public war between the United States and Great Britain, not only the *Caroline*, but *Durfee*, in concert with those who had taken possession of Navy Island, were engaged in a hostile invasion of Canada. It was like the affair of Copenhagen—a species of *unsolemn war*; (*Vattel*, B. 3, *ch.* 4, § 67;) and the laws of war, and of nations, must therefore govern the case. (*Elphinstone v. Bedreechund*, 1 *Knapp's Rep.* 316.)

Again: by the constitution of the United States, the power to declare war, conclude peace, and, generally, to superintend our foreign relations, is vested in congress and the general government. Under the exercise of the treaty-making power, redress for this whole offence—the destruc-



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tion of the *Caroline*, and the killing of *Durfee*—was at an early day demanded of the British government by the government of the United States; and the matter is still in course of negotiation between them. The state of New-York, therefore, cannot discreetly or lawfully interpose its municipal jurisdiction, and take cognizance of any part of this public offence against the nation. It is the exercise of an authority by the state, repugnant to the constitution and laws of the United States, bringing the two jurisdictions in conflict; and the general government having taken jurisdiction of the entire subject, that must be exclusive; for two separate and independent jurisdictions cannot lawfully act at the same time upon the same subject matter. (*Const. U. S. art. 1, § 8, 10, and art. 2, § 2. Gibbons v. Ogden, 9 Wheat. Rep. 1. Wilson et al. v. The Black Bird Creek Marsh Co. 2 Peters' Rep. 245. Harford v. The United States, 8 Cranch, 109. United States v. Peggy, 1 id. 103. Ware, adm'r, v. Hylton et al. 3 Dall. 199. Cooper v. Telfair, 4 id. 14. 2 id. 304. Sturges v. Crowningshield, 4 Wheat. 122. Houston v. Moore, 5 id. 1. McMillan v. McNeill, 4 id. 209. Jack v. Martin, 12 Wend. 311.*)

The act in which *McLeod* is alleged to have participated, being an exercise of the public force of Great Britain, of a hostile character, constitutes the subject of reclamation, reprisal and war, on the part of the government of the United States, as it shall deem fit, on a failure to obtain indemnity for the offence by negotiation. Any interference of the state authority is, and will be, incompatible with the exercise of this high power. The offence was committed against the nation, and not against the state; and the case belongs to congress and the national executive. New-York is unknown in our foreign relations, as is every other state in the union. A violation of her soil by foreign force, is an injury, not to any individual member of the confederacy, but to the *United States*. In that respect we are one territory, one people; having one interest, one voice, one duty, one responsibility. All—all--

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are the *United States*: and it is *her* territory that has been violated; *her* honor stained; the property of *her* citizen destroyed, and *her* citizen slain. Nations are only known to each other as friends, by their ambassadors; as enemies, by their armies. Of these, New-York has neither: they are forbidden her by the fundamental law of our government.

But we deny the right to put the prisoner on trial in any court, whether of the state or nation. They are both destitute of jurisdiction. The offence involves no individual guilt, nor does it call for individual expiation. Great Britain has avowed this open, flagrant violation of our territory, with whatever of aggravation accompanied it. Let us take her at her word—hold *her* to the responsibility; and let the prisoner go.

*Willis Hall*, (attorney general,) contra, insisted that the present motion was without precedent—a mere experiment; and being the first of the kind ever made, he trusted the court would find it their duty so to pronounce upon it, that it would be the last. By the law of England, a person indicted for murder will not be brought before the king's bench; nor will a writ of *habeas corpus* be granted at all, in a case like this. He commented upon the act of 31 *Car. 2, c. 2*, and the more recent act of 56 *Geo. 3, c. 100*; affirming, that were the prisoner's case to be disposed of according to the laws of his own country, the court could not listen to this application.

By that law, moreover, when a writ of *habeas corpus* is granted, the court gathers the facts from the return, and will not look beyond it even with a view to the question of bail. He referred to various decisions in support of this doctrine, among which were, *Swallow v. The City of London*, (2 *Kcb.* 50; *S. C. Sid.* 287, *pl. 3*;) *Gardiner's case*, (*Cro. Eliz.* 822;) *Leonard Watsons's case*, (9 *Adol. & Ellis*, 731;) *Bushell's case*, (*Vaugh. Rep.* 157.)

The revised statutes had gone farther; but not far enough to warrant the present motion. The provision allowing the prisoner to controvert the return, is not applicable to

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the case of one confined under an indictment, regular on its face, and found according to the form of law. An indictment is in the nature of a final judgment by a court of exclusive jurisdiction, and not a mere interlocutory proceeding. The court cannot control the finding of a grand jury. If they discharge the prisoner, it is a virtual trial of the indictment in a way unknown to the law.

Again : if the court go beyond the indictment, what facts are they to consider ? Can they extend their inquiry *aliunde* farther than to ascertain if the commitment or detention be legal ? They cannot. But once establish the principle claimed for this motion, and the range of inquiry becomes unlimited ; extending to the most difficult questions of guilt or innocence. It admits of no assignable boundary, but throws open the whole ground covered by the plea of not guilty, and invites every criminal, no matter how complicated the circumstances of his case, to come here and demand a summary trial, without jury. For, there is no distinction, save a nominal one, between inquiring whether the party is *innocent*, and trying his plea of *not guilty*. They are identical ; and must be disposed of in the appointed mode for determining the merits of a criminal prosecution. Besides, a grand jury are not to disclose the evidence on which they act. If, therefore, the court should attempt to go beyond the indictment, to the facts on which it was found, how are these to be ascertained ? In what mode are we to be informed of the secrets of the jury room, so as to determine that the case presented there, was *not* one of murder ? To the general doctrine, he cited *Rex v. Dalton*, (2 *Strange*, 911 ; ) *Lord Mohun's case* ; (1 *Salk.* 104 ; ) *Bethell's case*, (*id.* 348 ; ) adding, that as the sheriff's return set forth a formal, valid indictment, and showed the commitment and detention to be legal ; and as there was no fact proved, going to impugn either, the case should end here.

But the course taken by the prisoner's counsel, compelled him to go further. They insisted, the order under which the prisoner acted, admitting him to have particip

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ted in the affair of the Caroline, had been avowed by the British government. What weight is this entitled to? Viewed as a matter of justification to establish innocence, it involves facts exclusively for the consideration of a jury. Was any such order given? If so, was the prisoner acting under it when he encountered Durfee; and was the killing of the latter, *within* the order, or *beyond* it—an act of *obedience* simply, or of *cold-blooded murder*? These questions are all to be answered in favor of the prisoner, before the legal effect of the alleged avowal can be considered. The ground assumed therefore is not one consistent with the indictment, but negates its most material averments. It virtually says—“though the prisoner killed Durfee, he did it not in *malice*, but from *duty*.” The whole is nothing more than a plea of not guilty.

But the order, if one was given, does not sufficiently appear by Mr. Fox's letter. The letter says, that the transaction in question, was “planned by persons empowered by her majesty's government.” Was the transaction thus planned, the murder of Durfee? Such a supposition is absurd. What was it that these persons planned? There is a *rumor* that it was the destruction of the Caroline; but the letter leaves us to the widest latitude of conjecture. This letter further speaks of an authority to take *any steps necessary for the defence of her majesty's subjects*. Can this court determine that the murder of Durfee was such a step? No.

But it is denied, that the order could protect the prisoner, whatever its form. Though it might justify him to his own sovereign, it was inoperative here. Nor can the circumstance of this outrage having become the subject of a still pending negotiation, between the British government and our own, vary the result. On these topics Mr. Hall commented at length, reviewing the different propositions advanced by the prisoner's counsel, and illustrating his observations by reference to the following books and documents, viz: 4 *Black. Com.* 67; 1 *id.* 411; 1 *Kent's Crim.* 3; *Vatt. B.* 2, *ch.* 7, § 93; *id. B.* 3. *ch.* 2, § 15; *id. ch.*

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6, § 68; *Baker's case*, *House Doc. 20th Con. No. 93*; *Greely's case*, *id. 25th Cong. No. 1*; *Vatt. B. 3, ch. 8, § 151*; 4 *Marshall's Life of Washington*, 368; *Vatt. B. 1, ch. 6, § 75*; *id. B. 2, ch. 6, § 75*; *Co. Inst.* 163; 1 *Hale's P. C.* 99; *Foster's Crown Law*, 188; 1 *Black. Com.* 245, 246; *Vatt. B. 4, ch. 7, § 100*; 2 *Ward's Law of Nations*, 578.

As to the entry of a *nolle prosequi*, the court cannot interfere. Nor is this a proper case for the exercise of that power, wherever vested. The main transaction out of which the present indictment grew, was a lawless invasion of our territory—an offence which, according to Vattel, should be repelled by a state with the utmost vigor. Chancellor Kent maintains that there is *no exception to the rule* that a neutral territory cannot be lawfully invaded. (1 *Kent's Com.* 121.) If the *Caroline* had given just provocation, no time had been afforded to the authorities of New-York to act in the matter. The facts, moreover, contained in the affidavits produced against the prisoner, show the case to be one which should be passed on by a jury. If these facts should be established on an investigation, the British nation would be the first to repudiate the alleged crime, and declare that it was not done by their authority. At all events, Great Britain could not complain that we should, under these circumstances, refuse to deliver up the prisoner without trial. She has taken the lead among nations, in establishing the doctrine that she will not listen to a demand for redress of an injury done by herself, while a prior one committed against her remains unatoned for. Witness her transactions with Spain, in reference to the dispossession of her subjects at Nootka Sound, by the Spaniards; and afterward, in reference to a similar dispossession of her subjects at the Falkland Islands. These things are not referred to in the spirit of reproach, but of admiration. Great Britain there acted on a principle of high toned national self-respect—a principle, to the resolute maintenance of which she is indebted for her lofty and enviable position among the nations. In my early

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days, (Mr. Hall concluded,) in reading the records of Roman greatness, it was not her palaces, nor her temples, nor the extent of her dominions, nor the power of her armies, that thrilled me; but it was the magic power of the exclamation, even amongst the remote and barbarous nations, "I am a Roman citizen." And in modern times, the exclamation, "I am an Englishman," has become an almost equal passport and protection. When will the time arrive when the exclamation, "*I am an American citizen*," shall claim a like respect? Never, until we learn with equal scrupulousness to protect the life, liberty and property of the humblest citizen of our republic. Never, while we disarrange the decent folds of the drapery of our judiciary, with undignified haste, to obey the irregular and illegal demands of a foreign nation.

*By the Court*, COWEN, J. The prisoner's petition, on which I allowed this writ, contained an intimation that his commitment to the jail of the county of Niagara had not been regular; but that ground is now abandoned. The sheriff returns an indictment for murder, found by a grand jury of that county against the prisoner, on which he appears to have been arraigned at the court of oyer and terminer holden in the same county. It further appears that he pleaded not guilty, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Duffee by the prisoner, on a certain day, and at a certain town within the county.

These facts, although officially returned by the sheriff, were, by a provision in the *habeas corpus* act, (2 R. S. 471, 2d ed., § 50,) open to a denial by affidavit, or the allegation of any fact to show that the imprisonment or detention was unlawful. In such case, the same section requires this court to proceed in a summary way to hear allegations and proofs in support of the imprisonment or detention, and dispose of the party as the justice of the case may require. Under color of complying with this provision, which is of recent introduction, the prisoner, not denying

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The depositions heretofore taken in the cause being thus cut off, there are no means of enquiry left to us on this motion, by which we can say whether a murder was in fact committed, or whether the charge would probably be mitigated on the trial to a very doubtful case of manslaughter, or to a homicide in defence, or whether all participation might be disproved by showing a clear *alibi*. Nothing is better settled, on English authority, than that, on *habeas corpus*, the examination as to guilt or innocence cannot, under any circumstances, extend beyond the depositions or proofs upon which the prisoner was committed. This would be so, even on *habeas corpus* before an indictment found, however loosely the charge might be expressed in the warrant of commitment. Chitty, at the page before cited, says: "It is in fact to the depositions alone that the court will look for their direction: when a felony is positively charged, they will refuse to bail, though an *alibi* be supported by the strongest evidence." He cites *Rex v. Greenwood*, (2 Str. 1138,) a case of robbery, and eight

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ment against him had been obtained by perjury. (*Id.* 306.) MARSHALL, C. J. inquired of Mr. Martin, one of Burr's counsel, whether there was any precedent of a court having bailed for treason after the finding of a grand jury, on the ground either that the testimony before the grand jury had been impeached for perjury, or that other testimony had been laid before the court, which had not been in the possession of the grand jury. Mr. Martin said, he had not anticipated this case, and was not prepared with authorities; but he had no doubt that such existed. (*Id.* 308.) After considerable desultory discussion, the CHIEF JUSTICE declared, "that the act of congress, in express terms, enabled the court to bail a prisoner arrested for treason. That *there was no distinction between treason and other criminal cases*, as to the power to bail upon arrests; but that an arrest might be after a finding by a grand jury; *in which case, the finding of the grand jury would be the evidence on which the court would have to judge, whether the party arrested ought to be bailed.* That they were to exercise their discretion according to the nature and circumstances of the offence, and of the evidence and 'usages of law.' That the 'usages of law,' were to be found in the common law, and the practice of the courts; but that he doubted extremely, whether the court had the right to bail any person, after an indictment for treason had been found against him by a grand jury; especially in a case like the present, where the government was ready with its testimony, and there was no extraordinary circumstance, as an *alibi* clearly proved, (*but see Rex. v*

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credible witnesses making affidavit that the prisoner was at another place at the time when the robbery was sworn to have been committed; yet, adds the report, the court refused to admit him to bail, but ordered him to remain till the assizes. Here the crime is clearly proved by the depositions which have been read on the side of the people, while, instead of eight witnesses to an *alibi*, we have the solitary affidavit of the prisoner. In *Rex v. Acton*, (2 Str. 851,) it was alleged that the prisoner had before been tried for a murder and acquitted. Afterwards, on proof of facts exactly similar to those in question at his former trial, a justice of the peace issued a warrant charging him with another murder; and he was again committed. On his being brought up by *habeas corpus*, his counsel offered to show his former acquittal; yet the court refused to hear the proof. (1 *Barnardist. K. B.* 250, *S. C.*) On the authority of this case, Mr. Chitty, at the page of his book just cited, lays down the rule, that the court will not look into extrinsic evidence at all. He states a case wherein

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*Greenwood*, 1 Str. 1138,) to repel the effect of the finding of the jury; and that he wished authorities produced to satisfy the court, that it had the power." (1 *Burr's Trial, ut supra*, p. 310, 311.) Some further discussion ensued, when Burr enquired, whether the court would go into testimony extrinsic the indictment. The CHIEF JUSTICE answered, that he never knew a case similar to the present, where such an examination had taken place. Mr. Martin said, he would produce authorities, if he had time allowed him. The CHIEF JUSTICE insisted upon the necessity of producing *adjudged cases, to prove that the court could bail a party against whom an indictment had been found*. Mr. Burr replied, he did not wish to protract the session of the court, to suit his own personal convenience; and there was no time at present to look for authorities. The CHIEF JUSTICE observed, that he was then under the necessity of committing Col. Burr. Mr. Burr stated that he was willing to be committed, but hoped the court had not forestalled its opinion. "CHIEF JUSTICE.—I have only stated my present impressions. This subject is open for argument hereafter. Mr. Burr stands committed to the custody of the marshal." (*Id.* 312.)

Mr. Burr was at first confined in the public jail, and afterward, other places of confinement were provided for him, (*Id.* 351, 359;) but he was not bailed, nor, as seems, was the question of bailing him ever renewed by his counsel.



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the same question came up in respect to an inferior crime—receiving stolen goods with a guilty knowledge. The prisoner's affidavit denied his knowledge; yet the court refused to bail, saying the fact of knowledge was triable by a jury only. They added it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their case before the court. *Petersd. on Bail*, 522, refers to Chitty, who cites *Cas. K. B.* 96. This book, *co nomine*, does not appear now to be extant; and 12 *Mod.* the only reference I am aware of which, among the English quotations, is synonymous with Chitty's, does not appear to contain the case stated by him.(d) But it accords

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(d) The judge has since referred me to this case in *Cunningham's Rep.* 96, 2d ed. printed in 1770. It is as follows:

“ *REX vs. PARNAM.* ”

The defendant was brought up here by *habeas corpus*, from the house of correction, being committed there, for receiving a silver spoon, which was stolen, knowing it to be stolen; and Mr. *Eyres* moved that he might be bailed, having four creditable and substantial men for that purpose; and having an affidavit to produce, which positively swore, that though he did receive the silver spoon, yet that he did not know that it was stolen; and that the prisoner was an apprentice to an apothecary of this city, (London,) and the son of a gentleman of fortune. And cited the case of *Rex and Crips*, (6 *Geo.* 1,) to shew that the court will sometimes enter into the probability of the person's not being guilty, (of the matter of which he is accused,) and will read affidavits to that purpose.

The court, at first scrupled to suffer the affidavits to be read; but on citing *Crip's* case, they permitted it. And then Mr. Just. *Lee* said, that the prisoner had admitted the reception of the spoon, though he denies that he knew it was stolen: So that the only question is, whether he did know it or not; which is matter fit to be tried by none but a jury: and that the reason why they admitted *Crips* to bail, was, because the prosecutor himself confessed himself doubtful as to the identity of the person. But that is not the case here; and in *Crip's* case, I denied, on the trial, to grant him a copy of his indictment, in order to bring an action on it for a malicious prosecution; because the accusation seemed to be grounded merely on the mistake of the identity of the person.

CH JUST. (*Lord Hardwicke*). According to my brother *Lee's* state of the case of *Rex and Crips*, it appears that he was not bailed on consideration of the merits of the commitment, but of the mistake of the person accused. But here you apply to have the defendant discharged on the very us

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with many others in circumstance; and the reason given is almost too plain to demand any direct authority. To hear defensive matter through *ex parte* affidavits, as a ground for bailing the prisoner, would be to trench on the office of the jury; for in the case of high crimes, bail would be equivalent to an acquittal. Accordingly, the rule as laid down in *Horner's case*, (1 *Leach*, 270, 4th. *Lond. ed.* 1815,) is, in effect, the same with that stated by Chitty. The prisoner had been committed, under a charge of defrauding and robbing a man of his money by false pretences. It was insisted, that the facts stated in the depositions for the king made out a mere misdemeanor; and that the prisoner was therefore entitled to bail. But the transaction by which the money was obtained, admitted of one construction which might make it a felonious taking. The court said—“In cases of this kind, the course has always been to leave it to the jury to determine, *quo animo* the money was obtained. In such a case, the court never form any judgment whether the facts amount to a felony or not; but merely whether enough is charged to justify the detainer of the prisoner, and put him upon his trial.”

The cases I have noticed were, in several respects, stronger for the prisoner than the case before us. They were mostly founded on charges of a character much less serious than murder. They were all before indictment found; some of them presented a state of things on which it was plainly impossible to convict; and last, though not least, they were mere applications for bail; a thing which McLeod does not ask for. He demands an absolute discharge, on grounds upon which, according to the laws of England,

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As: but I think it would be of the most dangerous consequence, if we should allow of such proceedings; for then, all the prisoners in *England* would lay their case before us, and we, instead of the jury, must try the truth of the fact for which they are committed. Besides, it might very much encourage the compounding of felonies, between the prosecutor and prisoner. And therefore I think he ought to be remanded: and *per curiam* he was remanded, *absente Probyn.*”

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he would not even be entitled to bail.(e) The law of Eng. and formed, in this respect, the law of New-York, until our new *habeas corpus* act took effect.

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(e) The following decision, made at Charleston, Feb. 1838, by the South Carolina court of appeals, holds, that on the return of a mere warrant of commitment, even previous to an indictment found, the prisoner is not entitled, in virtue of the *habeas corpus* act, (31 Car. 2, c. 2,) to a discharge; but at most, only to enlargement on bail, if the offence appear to be bailable. It will be found in *Dudley's Law Rep. S. Car. p. 295, et seq.*; and being valuable, not merely in connection with the main points decided in McLeod's case, but also as furnishing directions in respect to the form and effect of the common magistrate's criminal warrant, it is here inserted at length.

“THE STATE vs. JAMES E. EVERETT.

Before BAY, J. at Chambers, July 28, 1837.

The defendant was brought up, by a *habeas corpus*, under the St. 31, Car. 2, c. 2, and the cause shown for his detention was the following warrant:

‘THE STATE OF SOUTH CAROLINA, }  
Charleston District. }

By Daniel Horlbeck, one of the justices of the quorum, in and for the district aforesaid.

To any lawful constable, and to the keeper of the common jail, in the said district:

These are to require you forthwith to convey and deliver into the custody of the keeper of the said jail, the body of James E. Everett, charged before A. H. Brown, on the oath of A. Gibson, from circumstances, with larceny of bank bills of the Union Bank of Florida, valued at about seventy dollars; there being other bills lost, and one \$50 and one \$20 bill being found on the person of said James E. Everett. And you, the said keeper, are hereby required to receive the said James E. Everett into your custody, in the said jail, and him there safely keep.

Given under my hand and seal, at Charleston, this twenty-first day of July, one thousand eight hundred and thirty-seven, and in the sixty-second year of American Independence.

DANIEL HORLBECK, Q. U [L. S.]

Acting for A. H. Brown.

The counsel for the defendant moved for his discharge, on the ground that the warrant contained no direct and certain charge of a felony, or any other offence, but was altogether loose, and founded, according to the warrant itself, on loose circumstances.

The attorney general contended, that the warrant contained a charge of larceny, sufficiently direct and certain; but that even if it were defective, the court was bound to commit the defendant, if sufficient evidence could be produced against him to warrant his being put upon his trial; and he produced a considerable number of affidavits, upon which, it appeared, the warrant had been issued.

His honor did not think there was any thing in the affidavits which would

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It becomes necessary next to inquire, whether the new statute has worked any enlargement of our powers beyond

warrant his depriving a citizen of his liberty, and being satisfied of the insufficiency of the warrant, he ordered the prisoner to be discharged.

A motion was then made on behalf of the defendant, that as the prosecution against him was at an end, the money taken from him should be returned. The attorney general opposed the motion, on the ground that the prosecution was not at an end ; and he should feel it his duty to submit the case to a grand jury. The motion was granted.

In connection with the foregoing, the court considered the case of

THE STATE vs. BENJAMIN POTTER.

Before BAY, J. at chambers, August 8, 1837.

In this case, the defendant was brought up upon a *habeas corpus*, and the cause shown for his detention, was the following warrant :

THE STATE OF SOUTH CAROLINA, {  
Charleston District. }

By Thomas Martin, one of the justices of the quorum, in and for the district aforesaid.

To any lawful constable, and to the keeper of the common jail in the said district :

These are to require you forthwith to convey and deliver into the custody of the said keeper of the said jail, the body of Benj. Potter, charged before me, upon the oath of Capt. Ross, with having committed larceny. And you, the said keeper, are hereby required to receive the said Benj. Potter into your custody in the said jail, and him there safely to keep.

Given under my hand and seal, at Charleston, this twelfth day of July, one thousand eight hundred and thirty-seven, and in the sixty-second year of American Independence.

THOMAS MARTIN, Q. U. [L. S.]

The defendant's counsel moved for his discharge, on the ground that the charge in the warrant was uncertain and insufficient ; and he called for the affidavits on which the prosecution was founded.

The attorney general contended that the charge in the warrant was sufficient ; and he declined to produce the affidavits, inasmuch as he had no objection to the defendant's being admitted to bail ; but that this was not moved for : and he denied the authority of the court to look into the affidavits, with a view to the discharge of the defendant without bail.

His honor ruled the warrant was insufficient, and ordered the defendant to be set at liberty.

The attorney general appealed from the decision of his honor in the above cases, and moved that the several orders made by him, in the said cases, might be reversed, or vacated, on the following grounds :

1st. That in each case, the warrant contained a charge of felony sufficiently direct and certain to warrant the detention of the defendant.

2d. That the defendant, in each case, having been committed for a felony plainly expressed in the warrant, his honor had no authority under the stat

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what we have seen they were up to the time when it passed. The 2 R. S. 469, 2d ed. § 40, 41, require us to ex-

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31 Car. 2, c. 2, to discharge the defendant; and that, sitting at chambers, he had no other authority to discharge the defendant, without requiring bail, or, at least, the defendant's own recognizance. It being respectfully submitted, that a judge at chambers has, independently of the St 31 Car. 2, c. 2, no other control over a prosecution, regularly instituted by a magistrate, than to admit the defendant to bail.

3d. That even if the warrant in *Everett's case* had been defective, his honor was bound on the evidence contained in the affidavits, to have committed the defendant for trial, or to have required bail.

4th. That at all events, his honor's jurisdiction extended no further than to discharge the defendant from confinement. He possessed no authority to acquit the defendant; or to forbid the continuance of the prosecution; and, therefore, he had no authority to order the money to be paid to the defendant; which, it is submitted, can only be done, when the defendant is acquitted by a jury, or the prosecution abandoned.

*H. Bailey*, attorney general.

*Elfe*, for defendant.

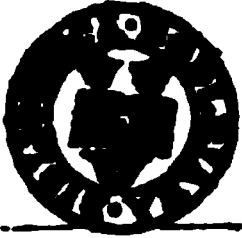
EARLE, J., delivered the opinion of the court.

The points presented in these two cases are the same, and they will therefore be considered together.

The defendants in both cases were brought up before a judge at chambers on *habeas corpus*. The cause shewn in each case, on the return of the writ, was a warrant of commitment, under the seal of a justice of quorum. In the case of *Everett*, the charge was stated, that the defendant was 'charged before A. H. Brown, on the oath of A. Gibson, from circumstances, with larceny of bank bills of the Union Bank of Florida, valued at seventy dollars, there being other bills lost, and one \$50 and one \$20 bill being found on the person of the said *Everett*.' In *Potter's case*, that he was 'charged before me, upon the oath of Captain Ross, with having committed larceny.' Both warrants commenced and concluded in legal form, and in every other particular were technically correct. In the case of *Everett*, a motion was made, on the return of the writ, for his discharge, on the ground that the warrant contained no direct and certain charge of felony, or any other offence; and in the case of *Potter*, a like motion was made on the ground, that the charge in the warrant was uncertain and insufficient; and both defendants were discharged, not from confinement on bail for their appearance, but were set at liberty, to go without day.

No decision that can be made by this court, will recapture the defendants, and bring them to justice. But it has been urged upon us by the attorney general, to express an opinion which may prevent their former discharge from being urged in their behalf, in case they should be retaken, and may serve to guide magistrates in like cases.

At this day, one would hardly suppose that a question could arise on the



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amine the facts contained in the return, and into the cause of the confinement of the prisoner; and if no legal cause

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subject of proceedings under the *habeas corpus* act, and yet there does seem to be a popular misapprehension in relation to them, indicating a belief that the *habeas corpus* act is a sort of universal relief-law—a summary general jail delivery.

The object of the statute was, to provide a mode of relief from unlawful imprisonment; a confinement without lawful warrant, without legal cause, on vague, indefinite and uncertain charges. But the protection intended by the act, goes no farther than an enlargement on bail for the appearance of the prisoner at the next sessions; and it is not every prisoner that can claim even this enlargement *ex debito justitiæ*. Under the act, in the very section which provides for issuing the writ, an important exception gives character to the whole proceeding—‘unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment,’ on the return of the writ, with the cause of the detention, the judge ‘shall discharge the said prisoner from his imprisonment, taking his recognizance for his appearance, with one or more surety or sureties, in any sum according to his discretion, &c., unless it shall appear that the party so committed is retained upon legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant, signed and sealed by some justice of the peace, for such matters or offences, for the which, by the law, the prisoner is not bailable.’ The object, therefore, is to ascertain the cause of arrest and imprisonment, and to obtain bail, if the offence be one for which bail can be allowed. Grand larceny is a felony, for which bail is not granted of course, and, I apprehend, few cases can be found since the case of ———, in Lord Mansfield’s time, where one caught with the stolen goods upon him has not been committed to jail.

In the case before us, the warrants do contain an explicit charge of a distinct and specified offence. In the case of Everett, it is for ‘felony plainly and specially expressed,’ for which by the law the prisoner was not bailable, stating in fact that he had the stolen goods upon him. By virtue, therefore, of any powers delegated by the *habeas corpus* act, such a person could not be bailed, much less released, and set at liberty, to go without day.

In the case of Potter, the charge is—that the prisoner had committed larceny, without any facts or circumstances to show whether it was grand or petit larceny. In such case, in favor of liberty, without more appearing from the depositions or examinations, I should regard it as a charge of petit larceny, and admit to bail. Potter, therefore, should have been bailed, but not released. We think the warrants of commitment are sufficiently certain in both cases. It is a great mistake to suppose that a warrant for apprehension, or a warrant of commitment, need contain any statement at all of the evidence on which it is founded, or need enumerate any of the facts and circumstances accompanying the offence. There are several high authorities that it need not even contain a specification of the particular offence. But the better opinion, as well as the general and approved practice




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be shown for it, or for its continuation, we are to discharge him. That here is legal cause, viz. an indictment for mur

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is, that it should state the offence with convenient certainty—that it should not be for felony generally, but should contain the special nature of the felony: as, for felony of the death of J. S., or burglary, in breaking the house of J. S. But supposing the offence to have been described with too little certainty, it should have been only regarded as good cause for admitting the party to bail.

Independently, however, of the *habeas corpus* act, the court of sessions, by virtue of its general powers in criminal matters, may in term time or at chambers, admit a prisoner to bail, in all offences and felonies whatever. It is a great power, and is to be exercised with discretion. But, said Lord Mansfield on an application for bail in a celebrated case, ‘discretion when applied to a court of justice, means sound discretion guided by law; it must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.’ And here it may not be amiss to show the practice of the English courts on this subject.

One came up on *habeas corpus*, charged with a commitment for robbery on the highway; the prosecutor attending, insisted he was the man, and although eight affidavits of credible persons, proving him to be at another place at the time of the robbery, were read, yet the court refused to admit him to bail, and remanded him until the assizes. (2 *Strange*, 1138.)

But the court will look into the depositions, and bail accordingly; and if committed for manslaughter, yet if the depositions made it murder, the court will not bail, and *e converso*. (*Ib.* 1242.)

And in *Rex v. Judah*, (2 *T. R.* 225,) the discharge of the prisoner was moved for, because the word ‘feloniously’ was omitted in the commitment, which was for a statutory offence, stating the circumstances supposed to create the offence. Ashurst, J. said, ‘unless it appears on the face of the commitment itself, that the defendant is charged with a felony, we are bound by the *habeas corpus* act to discharge him, taking such bail as we shall think fit, according to the circumstances of the case; and Grose, J.: ‘It would be sufficient if upon the facts stated they could not but see that the act was feloniously committed.’ In that case the circumstances did not amount to a charge of felony, and they bailed him.

But in the *King v. Marks*, (3 *East*, B. 157, *et al.*,) where the warrant of commitment contained an insufficient statement to constitute felony, and the depositions were very full, and stated the offence with sufficient precision, the court refused to bail and remanded.

In the exercise of this general power, which in England appertains to the court of king’s bench, and here to the court of general sessions, there is no doubt that a judge, before whom a prisoner is brought, will look beyond the commitment, if necessary, and will bail, or remand, according to circumstances. And in admitting to bail, he should pay due regard to the statute for regulating bail, and should not admit to bail a person who is there expressly declared to be debarred from it, without some particular circumstances in his favor. He should not undertake to determine fully upon the guilt of a prisoner, and set him at liberty without bail and without day, however imper

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der, and an order of commitment, we have seen is not denied. By the 45th section, p. 470, if it appear that the party has been legally committed for any criminal offence, we are required to let him to bail, if the case beailable. But so far, we have no direction as to what case shall be consideredailable. We are left under the restraints which I have noticed as existing before the statute. Not one of them is removed by it.

Then comes section 50, p. 471, which is relied on by the prisoner's counsel. I briefly noticed this, in proposing the question to be considered. But the prisoner is entitled to the benefit of it entire. The words are, that "the party brought before such court or officer, on the return of any writ of *habeas corpus*, may deny any of the material facts set forth in the return, or *allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge*, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed in a summary way, to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require." Under this statute, the prisoner's counsel claim the right of going behind

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fectly the offence may have been charged in the commitment, or however strong the circumstances in his favor, proved by affidavits, or collected from the examination. Such a power does not exist in any judge, in term time or at chambers, where any offence at all is alleged; such a power would be superior to the laws, wherever lodged. It would, to all purposes, be a dispensing power, as effectual and dangerous as any that has been claimed or exercised under the most arbitrary government.

We are constrained, therefore, to say that his honor who heard the motions at chambers exceeded his powers and decided erroneously, when he discharged the prisoners without trial, without bail, and without day; that in the utmost latitude of his discretion, he should only have admitted them to bail; and as to Everett, that in the exercise even of that discretion, he should not have been bailed without strong circumstances in his behalf, shown by affidavit.

So far as regards the prisoners, if proceedings against them should go on, the orders to discharge them, and the other orders, are set aside and annulled.



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the indictment, and proving that he is not guilty by affidavit, as he may by oral testimony before the jury. We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English criminal courts. And we are not disposed to admit its adoption by our legislature, without clear words or necessary construction.

We think its object entirely plain, without a resort to the rules of construction. Its words are satisfied by being limited to the lawfulness of the authority under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain, by considering the evil which the statute was intended to remedy. At common law, it was doubtful whether the prisoner could question the truth of the return, or overcome it, by showing extrinsic matter upon the point of the authority to imprison. The statute was passed to obviate the oppression that might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or if true, depending for its validity on the act of a magistrate or court which can be shown by proofs *aliunde* to have been destitute of jurisdiction. (*Watson's case*, 9 *Adolph. & Ellis*, 731. 3 *R. S.* 784, 5, 2d ed., *app. note*.) An innocent man may be, and sometimes unfortunately is, imprisoned. Yet his imprisonment is no less lawful than if he were guilty. He must await his trial before a jury. There are various cases in which the enactment, allowing proof extrinsic to the return, may have effect without supposing it applicable here. It must, I apprehend, for the most part, apply to cases where the original commitment was lawful, but in consequence of the happening of some subsequent event, the party has become entitled to his discharge; as, if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only. So, after conviction, he may allege a pardon, or that the judgment under which he was impris

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oned, has been reversed. Nor is it necessary to inquire how far we might be entitled to go, were the prisoner in custody on the mere examination and warrant of a committing magistrate.

But it is said, we have power to direct the entry of a *nolle prosequi*, and it is our duty to look into the merits of the case with a view to decide whether it be a proper one for the exercise of that power. This proposition is also put upon a new section of the revised statutes, which most clearly gives no color for the suggestion. At common law the attorney general alone possessed this power,<sup>(f)</sup> and might, under such precautions as he felt it his duty to adopt, discontinue a criminal prosecution in that form at any time before verdict. The power and practice under it are laid down in 1 *Chit. Cr. Law*, 478, *ed. before cited*. It probably exists unimpaired in the attorney general to this day; and it has been by several statutes delegated to district attorneys, who now represent the attorney general in nearly every thing pertaining to indictments, and other criminal proceedings, local to their respective counties. The legislature finding the power in so many hands, and fearing its abuse, by the 2 *R. S.* 609, § 54, 2d *ed.* provided, that it should not thereafter be lawful for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way discontinue or abandon the same, without leave of the court having jurisdiction to try the offence charged. This provision, the prisoner's counsel contended, so enlarged our powers that we might arbitrarily interfere

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(f) The following is related of Sir John Holt, Ch. J. of the K. B. in the reigns of Wm. and Ann: "There were some persons in London who pretended to possess the power of foretelling future events, and who were called the French prophets. Holt having upon occasion committed one of these to prison, a disciple of his came to the chief justice's house, and desired to see him. On being admitted, he said: 'I come from the Lord, who bade me desire thee to grant a *nolle prosequi* for John Atkins, his servant, whom thou hast thrown into prison.' 'Thou art a false prophet and lying knave,' returned the chief justice. 'If the Lord had sent thee, it would have been to the attorney general; for the Lord knoweth that it is not in my power to grant a *nolle prosequi*.'" (*Law of Lawyers*, vol. 1, p. 293, 294, *Phil. ed.*)

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on the prisoner's affidavit and other proofs verifying his innocence, or even on grounds of national policy, as where the prosecution would be likely to affect our foreign relations unfavorably; and that too, in despite of the attorney general and district attorney. Conceded as it was, that before the revised statutes, we had no right to give such direction, the argument seeks to draw from the statute giving us a *veto against the nolle prosequi*, a positive power to compel its entry. Even if we had such power, the argument would be quite extraordinary. It demands that we should finally dispose of an indictment for murder, on the sort of evidence by which we are guided upon a motion to set aside a default, or change a venue. In any view, this question belongs primarily to the executive department of the government.

I shall have occasion to inquire hereafter, whether these views should not be regarded as a final answer to this application. That will depend on the question, whether the facts stated on the part of the prisoner, supposing them to be admissible at all, are proper for the consideration of the jury only; or whether, as counsel have insisted with great zeal, they are such as to divest our criminal courts of all jurisdiction, either over the subject matter, or person of the prisoner. We should, as we thought at the close of the argument, have felt ourselves entirely satisfied to dispose of the case on the first question, without looking any farther into the nature of the transaction out of which this indictment has arisen. But, as counsel made the question of jurisdiction their main topic, we preferred to reserve the case, and have looked into it as far as possible during a very short vacation, consistently with other pressing judicial avocations.

Want of jurisdiction has not been put on the ground that McLeod was a foreigner. An alien, in whatever manner he may have entered our territory, is, if he commit a crime while here, amenable to our criminal law. (*Lord Mansfield, in Campbell v. Hall, Cowp. 208. Vattel, B. 2, ch. 8, § 101, 2. Story's Confl. of L. 518, 2d ed.*) Nay,

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says Locke, though he were an *Indian*, and never heard of our laws. (*Locke on Civ. Gov. B. 2, ch. 2, § 9.*)

But it is said, his case belongs exclusively to the forum of nations, by which, counsel mean the diplomatic power of the United States and England, or in the event of their disagreement, the battle field. I have already admitted that counsel may, under the 50th section of the *habeas corpus* act, allege and prove a want of jurisdiction. To show this, the affidavit of McLeod is produced, from which the inference is sought to be raised, that the Niagara frontier was in a state of war against the contiguous province of Upper Canada; that the homicide was committed by McLeod, if at all, as one of a military invading expedition, set on foot by the Canadian authorities, to destroy the boat *Caroline*; that he was a British subject; that the expedition crossed our boundary, sought the *Caroline* at her moorings in Schlosser, and there set fire to and burned her, and killed Durfee, one of our citizens, as it was lawful to do in time of war.

We need not stay to examine the conclusion, viz. a want of jurisdiction, if the premises be untrue. To warrant the destruction of property, or the taking of life on the ground of public war, it must be what is called *lawful war*, by the law of nations, a thing which can never exist without the actual concurrence of the war-making power. This, on the part of the United States, is congress; on the part of England, the queen. A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown; and this is *presumptio juris et de jure*, until the national power of the country in which such courts sit, officially declares the contrary. A learned English writer on the law of nations makes this remark: (1 *Ward's Law of Nations*, 294 :) "Although I am aware that there is a great authority for the contrary opinion, yet it is upon the whole settled, that no *private* hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. No far, indeed, has my Lord Coke carried this point, that

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he holds, if *all* the subjects of a king of England were to make war on another country in league with it, but without the assent of the king, there would still be no breach of the league between the two countries." (1 *Bl. Comm.* 267, *S. P.*) Again, in *Blackburne v. Thompson*, (15 *East*, 81, 90,) Lord Ellenborough, Ch. J., delivering the opinion of the court of king's bench, said, "I agree with the master of the rolls, in the case of the *Pelican*, (1 *Edw. Adm. Rep. Append. D.*) that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it; and that it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations. But when the crown has decided upon the relation of peace or war in which another country stands to this, *there is an end of the question.*" (3 *Camp.* 66, 7, *S. C. and S. P.*)

So far were the two governments of England and the United States from being in a state of war, when the *Caroline* was destroyed, that both were struggling to avoid such a turn of the excitement then prevailing on the frontier, as might furnish the least occasion for war. Both had long maintained the relations of national amity; and have done so ever since under an actual treaty. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while on our side, we have inflicted legal punishment on the leaders of the expedition, of which Durfee made a part, on the ground that England was then at peace with us. Whatever hostile acts she did, were aimed exclusively at private offenders; and if there was a war in any sense, the parties were England on one side, and her rebel subjects, aided by certain citizens of our own, acting in their private capacities, and contrary to the wishes of this government, on the other.

In speaking of public war, I mean to include, all national wars, whether general or partial; whether publicly declared, or carried on by commissions, such as letters of

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marque, military orders, or any other authority emanating from the executive power of one country, and directed against the power of another; whether the directions relate to reprisals, the sieges of towns, the capture or destruction of private or public ships, or the persons or property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object the exercise of some influence or control over the adverse nation as such. I deny that public war in this sense can be made out by affidavit, or by any other medium of proof than the denunciation of war by one or both of the two nations who are parties to it.

There are but three sorts of war, *public*, *private*, and *mixed*. (*Grot. B. 1, ch. 3, § 1.*) Private war is unknown in civil society, except where it is lawfully exerted by way of defence between private persons. To constitute a public war, at least two nations are essential parties, in their corporate capacities. Mixed war can be carried on only between a nation on one side, and private individuals on the other. There is no fourth kind. (*Grot. ut supra.*)

The right of one nation, or any of its citizens, to invade another, or enter it and do any harm to its property or citizens, does not arise till public war be lawfully denounced in some form. It does not arise where one nation has a quarrel with private persons being within the territory of another. Whether there be any exception to this rule, I shall hereafter inquire.

Much was said in argument, on the assumption that the state of hostilities on the frontier amounted to *unsolemn war*. In supposing this to be so, counsel come back to the very error which they repudiated in more general terms. A war is none the less *public* or *national*, because it is *unsolemn*. All national wars are of *two kinds*, and two only; war by *public declaration*, or war denounced without such *declaration*. The first is called solemn or perfect war, because it is general, extending to all the inhabitants of both nations. In its legal consequences it sanctions indiscriminate hostility on both sides, whether by

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way of invasion or defence. The second is called unsolemn or imperfect war, simply because it is not made upon general, but special declaration. The ordinary instance is a commission of reprisal, limiting the action of the nation plaintiff to particular objects and purposes against the nation defendant. It supposes a partial grievance, which can be redressed by a corresponding remedy or action; and does not authorize hostility beyond the scope of the special authority conferred. Such are several of the instances I have just now mentioned. But they are no less instances of public war. The attack on Copenhagen was mentioned on the argument as an instance of unsolemn war. So indeed it was. The British admiral had a deputation from the war-making power of England, to act against the war-making power of Denmark; to demand the surrender of the Danish fleet, and, on refusal, to destroy public or private property, or take life, not as a punishment of private offenders, but to coerce the nation. Why was the attack made? Because Denmark would not surrender her navy voluntarily; and there was danger that France would take it, either by force or under collusion on the side of Denmark. Those who were in arms on the side of Denmark, acted not in their own right, but as agents of the nation to which they were subject. Before the remotest analogy can be seen between that case and the one at bar, the United States must be brought in and made defendant in their corporate capacity. It will be seen, I trust, by this time, that the instance derogates not in the least from the distinction that runs through all the writers on international law, viz. that to constitute either solemn or unsolemn war, the authority to act must emanate from the war-making power on one side, and be intended to influence that power on the other. Action under such a power is necessarily a collision between two nations; and answers to Grotius' definition, viz: "That is a public war which is made on each side by the authority of the *civil power*." (*B. 1, ch. 2, § 1.*) At section four, he divides this sort of war into solemn and unsolemn, of which latter he gives an instance

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in B. 3, ch. 2, § 2, N. 3. (*Vide also Ruth. B. 2, ch. 9, § 9, 10.*) The distinction has been followed to this day, though the legal character of *unsolemn* war has since been changed. "Both," says Rutherford, "are now lawful. The only real effect of a declaration of war is, that it makes the war a general one; whilst the imperfect sorts of war, such as *reprisals*, or acts of *hostility*, are partial, or are confined to *particular* persons, or things, or places. In a *solemn* war, all the members of one nation act against the other under a general commission; whereas in public wars which are not solemn, those members of one nation who act against the other, act under particular commissions." (*Ruth. B. 2, ch. 9, § 18. Vat. B. 3, ch. 15.*) And see this distinction well treated, 1 *Hal. P. C.* 162, 163.

Both sorts of war are lawful, because carried on under the authority of a power having, by the law of nations, a right to institute them. In any other war no belligerent rights can be acquired. All captures, all destruction of property, must be illegal; and the taking of life a crime. Short of this, war cannot be carried into an enemy's country, for the simple reason that there is no war to carry there, and no enemy against whom it can be exerted. The nation denouncing war must be explicit. "This makes it," says Vattel, "*formal*, and so *lawful*." "But nothing of this kind," says he, "is the case in informal, illegitimate war, which is more properly called depredation. A nation attacked by enemies, without the sanction of a public war, is not under any obligation to observe towards them the rules of formal warfare. She may treat them as *robbers*." (*Vat. B. 3, ch. 4, § 68.*) "Such unauthorized volunteers in violence," says Blackstone, "are not ranked among open enemies; but are treated like *pirates* and *robbers*." (3 *Black. Com.* 267.)

It was accordingly conceded, in argument, that the Canadian provincial authorities had no inherent power to institute a public war. (*Vide Ruth. B. 2, ch. 9, § 9.*) We were, however, referred to *Burlamaqui, pt. 4, ch. 3, § 18, 19*, to show that those authorities might do so on the presumption



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tion that their sovereign would approve the step; and that such approbation would reflect back, and render the war lawful from the beginning. On the assumption that this indirect mode of instituting war had actually been resorted to, counsel again bring themselves back to the fundamental error which led to this application. No one would deny that, if the affair in question can be tortured into war between this nation and England, the United States might take possession of McLeod as a prisoner of war. In such a case, there would have been no need of this motion. But admitting the rule of Burlamaqui, and that counsel might, by the aid of England, get up an *ex post facto* war for the benefit of McLeod, this cannot be done by an *equivoque*; and especially not in contradiction to the language of England herself. Neither the provincial authorities nor the sovereign power of either country have, to this day, characterized the transaction as a public war, *actual* or *constructive*. They never thought of its being one or the other. Both have spoken of it as a transaction *public on one side*, to be sure; but both claimed to hold fast the relations of peace. Counsel seem to have taken it for granted that a nation can do no public forcible wrong without its being at war, even though it deny all action as a belligerent. At this rate, every illegal order to search a ship, or enter on a disputed territory, or for the recapture of national property even from an individual, if either be done *vi et armis* and work wrong to another nation or any of its subjects, would be public war; necessarily so, though the actor should deny all purpose of war. Were such a rule once admitted, England and the United States can scarcely be said to have been at peace since the revolution which made them two nations. My endeavor has been to show that on the question of war or peace there is a *quo animo* of nations, by which we are bound.

To prevent all misunderstanding in the progress of the argument, it is proper to observe farther, that an act of jurisdiction exerted by inferior magistrates, civil or military, for the arrest or punishment of individuals, is not *public*

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war of either kind. So long as the act is kept within legal compass, though its exertion be violent, where, for instance, the object is to suppress a riot, quell an insurrection, or repel the hostile incursions of individuals, it is, though sustained by a soldiery in arms, only one mode of enforcing the criminal law. It is like calling out the militia as a *posse comitatus* to aid a sheriff who is resisted in the execution of process. Force becomes lawful where the laws are set at defiance. We see this in the frequent resort to soldiers of the regular army by the English, in cases of dangerous riots. (*Vid. Ruth. B. 2, ch. 9, § 9.*) Such a state of things, therefore, confers no right to act offensively against individuals who reside or sojourn in the neighboring territory. Should they be pursued and arrested, or killed, the act would be a naked usurpation of authority; like the sheriff of one county going into another to execute process. "If," says Rutherford, (*B. 2, ch. 9, § 9,*) "the magistrate, in any instance, use even the force with which he is entrusted in any other manner or for any other purpose than is warranted by his appointment, this, *as it is his own act*, and not the act of the public, cannot be called public war."

Sensible that all pretence of belligerent right was wanting, it was therefore, in the first view—as a *lawful act of magistracy*—that the case was sought to be put by Mr. Fox, both in his letter to Mr. Forsyth and Mr. Webster. I take the words of his last letter, written after the question had been deliberately considered by his government: "The grounds upon which the British government make this demand [the surrender of McLeod] are these: that the transaction on account of which Mr. McLeod has been arrested, and is to be put upon his trial, was a transaction of a *public character*, planned and executed by persons duly empowered by her majesty's colonial authority, to take any steps and do any acts which might be necessary for the *defence* of her majesty's territories and for the *protection* of her majesty's subjects: and that *consequently*, those subjects of her majesty who engaged in that transaction were performing an act of *public duty*, for which they cannot be made person

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law of nations ever ventured the assertion, that one of two belligerents can lawfully do any hostile act against another upon neutral ground. If it be not a plain deduction from common sense, yet, on principles in which publicists universally agree, all rightful power to harm the person or property of any one, dropped from the hands of McLeod and his associates the moment they entered a country with which their sovereign was at peace. No exception can be made consistently with national safety. Make it in favor of the subordinate civil authorities of a neighboring state, and your territory is open to its constables; in favor of their military, you let in its soldiery; in favor of its sovereign, and you are a slave. Allow him to talk of the acts and machinations of our citizens, and send over his soldiers on the principle of protection, to burn the property or take the lives of the supposed offenders, and you give up, to the midnight assault of exasperated strangers, the dwelling and life of every inhabitant on the frontier whom they may suspect of a disposition to aid their enemies. Never, since the treaty of 1783, had England, in time of peace with us, any more right to attack an enemy at Schlosser, than would the French have at London, in time of peace with England.

"The full domain," says Vattel, "is necessarily a peculiar and exclusive right. The general domain of a nation is full and absolute; since there exists no authority upon earth by which it can be limited; it therefore excludes all right on the part of foreigners." (*B. 2, ch. 7, § 79.*) The same writer defines the jurisdiction of courts within that domain. "The sovereignty united to the domain, establishes the jurisdiction of the nation in her territories. It is her province, to exercise justice in all the places under her jurisdiction; to take cognizance of the crimes committed, and the differences that arise in the country." (*Id. § 84.*) "It is unlawful," says the same writer "to attack an enemy in a neutral country, or to commit in it any other act of hostility." (*B. 3, ch. 7, § 132.*) "A mere *claim* of territory," says Sir Wm. Scott, a British judge of admiralty. "is un-

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doubtedly very high. *When the fact is established, it overrules every other consideration.*" (*The Vrow Anna Catharina*, 5 Rob. Adm. Rep. 20, 21.) And he refused to recognize a right of capturing an enemy's ship within a marine league of our coast. (*The Anna, La Porte*, *id.* 332.) "We only exercise the rights of war in our own territory," says Bynkershoek, "or in the enemy's, or in a territory which belongs to no one." (*Quest. Jur. Pub. B. 1, ch. 8.*) "There is no exception," says Chancellor Kent, "to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful." (1 *Kent's Comm.* 119, 4th ed.) "The jurisdiction of courts," says Marshall, C. J. "is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself: any restriction derived from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." (*The Schooner Exchange v. M'Fadden et al.*, 7 *Cranch*, 116, 136.) That these are not rules of yesterday; but have formed a part of the acknowledged law of nations for nearly two thousand years, may be seen in Grotius, (*B. 3, ch. 4, § 8, N. 2.*) He says, we may not kill or hurt an enemy in a country at peace with us. "And this proceeds, not from any privilege attached to their persons, but from the right of that prince in whose dominions they are. For all civil societies may ordain that no violence be offered to any one in their territories but by a proceeding in a judicial way, as we have proved out of Euripides—

‘If you can charge these guests with an offence,  
Do it by law, forbear all violence.’

But in courts of justice, the merit of the person is considered, and this promiscuous purpose of hurting each other ceases. Livy relates, that seven Carthaginian gallees rode in a port belonging to Syphax, who, at that time, was at

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peace both with the Carthaginians and Romans; and that Scipio came that way with two gallees. These might have been seized by the Carthaginians before they had entered the port, but being forced by a strong wind into the harbor, before the Carthaginians could weigh anchor, they durst not assault them in the king's haven." Several more modern instances of a like character are stated by Molloy, (*De Jur. Mar. B. 1, ch. 1, § 16.*) It is said to be a rule in the modern law of nations, that not only must the parties refrain from hostilities while in a neutral port; but should one set sail, the other must not, till twenty-four hours after. (*Martens' L. of Nations, B. 8, ch. 6, § 6, note.*) And a doctrine about as strong was laid down by Sir Wm. Scott, in the case of the *Twice Gebroeders*, (3 *Rob. Adm. Rep.* 162.)

To apply these authorities: The affidavit of McLeod suggests that Durfee had, on the day before he was killed, aided in transporting military stores to Navy Island, and surmises that he intended to continue the practice. I put it again that the war, if any, was by England against him and his associates -- not against the United States. But what right, I again ask, had she to pursue him into a territory at peace? That she had none, I have shown from her own judge sitting in the forum of nations, from one of our judges sitting in the like forum, from authoritative publicists, and from all antiquity. I have shown that even punic faith felt itself bound to let an enemy go free when he accidentally met on neutral ground. Within the territory of a nation at peace, all belligerent power, all belligerent right, is paralyzed. They have passed from the dominion of arms to that of law. "No violence can be offered," says Grotius; "but you must proceed in a judicial way." The only offence against our law which Durfee had committed, was in setting on foot a hostile expedition against England with whom we were at peace. So far I admit he was guilty, according to the suggestion in McLeod's affidavit. He had made himself a principal in the aggression of McKenzie and others; for there are no accessories in misdemeanor. The courts were open. Why did not England

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prefer her complaint? Was it competent for her to allege that our justice was too mild or too tardy, and therefore substitute the fire brand and musket? To admit such a right of interference on any ground or in any way, says Marshall, would be a proportional diminution of our own sovereignty, of which judicial power makes a part. "The law of nations," says Rutherford, "is not the only measure of what is right or wrong in the intercourse of nations with each other. Every nation has a right to determine, by positive law, upon what occasions, for what purposes, and in what numbers, foreigners shall be allowed to come within its territories." (*Ruth. B. 2, ch. 9, § 6. Vattel, B. 2, ch. 7, § 94.*)

It follows from the authorities cited, that a right to carry on mixed war never extends into the territory of a nation at peace. It can be exercised on the high seas only, or in a territory which is vacant and belonging to nobody. It is in modern law confined mainly to the case of pirates. But even these cannot be arrested in the territory of a foreign nation at peace with the sovereign of the arresting ship. (*Molloy de Jur. Mar. B. 1, ch. 1, § 16.*)

But admitting that England might protect a man against our jurisdiction, by saying he did a public act under her authority, does it not behoove her at least to show that she has acted within the limits of her own jurisdiction, especially where she has prescribed them to herself? Shall her declaration enure to deprive us of power where she is exceeding her own? And this brings me to inquire whether the transaction in question be such as any national right so far examined can sanction. She puts herself, as we have seen, on the law of defence and necessity; and nothing is better defined nor more familiar in any system of jurisprudence, than the juncture of circumstances which can alone tolerate the action of that law. A force which the defender has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury unless prevented by the resistance which he opposes. The rights of self defence and the de-

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fence of others standing in certain relations to the defender, depend on the same ground ; at least they are limited by the same principle. It will be sufficient, therefore, to inquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone, (3 *Black. Com.* 4,) that, to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. "But," he adds, "care must be taken that the resistance does not exceed the bounds of *mere defence* and *prevention* ; for then the *defender* would himself become the *aggressor*." The condition upon which the right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition, or those limits. The Caroline was not in the act of making an assault on the Canadian shore ; she was not in a condition to make one ; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever they could find her, and were in fact obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants ; and their attack might have been legally repelled by Durfee, even to the destruction of their lives. The case made by the affidavit is in principle this : a man believes that his neighbor is preparing to do him a personal injury. He goes half a mile to his house, breaks the door and kills him in his bed at midnight. On being arraigned, he cites the law of nature ; and tells us that he was attacked by his neighbor, and slew him on the principle of mere defence and prevention ; or, in the language of the plea of *son assault demense*—"he made an assault upon me, and would then and there have beat me, had I not immediately defended my-



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self against him; wherefore I did then and there defend myself as I lawfully might for the cause aforesaid; and in doing so, did necessarily and unavoidably beat him, doing him on such occasion no unnecessary damage. And if any damage happened, it was occasioned by his assault and my necessary defence."

To excuse homicide in self defence, says another English writer, the act *must not be premeditated*. He must first retreat as far as he safely can, to avoid the violence threatened by the party whom he is obliged to kill. The retreat must be with an honest intention to escape; and he must flee as far as he conveniently can by reason of some impediment, or as far as the fierceness of the assault will permit him, and then in his defence, he may kill his adversary. (1 *Russ. on Cr.* 544.)

Such is the law of mixed war, on neutral ground. The books cited are treating of no narrow technical rule peculiar to the common law; but the law of nature and of nations, the same every where, of such paramount force as no municipal or international law could ever overcome; and intelligible to every living soul. It is easily applied, both as between individuals in civil society and nations at peace. Passing the boundary of *strict* not *fancied* necessity, the remedy lies in suit by the state or citizen whose rights have been violated, or by demanding the person of the mischievous fugitive who has broken the criminal law of a foreign sovereign. Accordingly, Pufendorf, after considering the rights of private war in a state of nature, adds: "But we must by no means allow an equal liberty to the members of civil states. For here, if the adversary be a foreigner, we may resist and repel him any way, at the instant when he comes violently upon us: But we cannot, without the sovereign's command, either assault him whilst his mischief is only in machination, or revenge ourselves upon him after he hath performed the injury against us." (*Puf. B.* 2, *ch.* 5, § 7.) The sovereign's command must, as we have seen, in order to warrant such conduct in his subject, be a denunciation of war



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England, then, could legally impart no protection to her subjects concerned in the destruction of the *Caroline*, either as a party to any war, to any act of public jurisdiction exercised by way of defence, or sending her servants into a territory at peace. That her act was one of mere arbitrary usurpation was not denied on the argument, nor has this, that I am aware, been denied by any one except England herself. I should not, therefore, have examined the nature of the transaction to any considerable extent, had it not been necessary to see whether it was of a character belonging to the law of war or peace. I am entirely satisfied it belongs to the latter: that there is nothing in the case except a body of men, without color of authority, bearing muskets and doing the deed of arson and death; that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or to show that it can plausibly claim to come within any law of war, public, private, or mixed. Even the British minister is too just to call it war; the British government do not pretend it was war.

The result is, that the fitting out of the expedition was an unwarrantable act of jurisdiction exercised by the provincial government of Canada over our citizens. The movements of the boat had been watched by the Canadian authorities from the opposite shore. She had been seen to visit Navy Island the day before. Those authorities, being convinced of her delinquency, sentenced her to be burned; an act which all concerned knew would seriously endanger the lives of our citizens. The sentence was, therefore, equivalent to a judgment of death; and a body of soldiers were sent to do the office of executioners.

Looking at the case independently of British power, no one could hesitate in assigning the proper character to such a transaction. The parties concerned having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man has been killed, it is murder.

This brings us to the great question in the cause. We

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on that a capital offence was committed within our time of peace; and the remaining inquiry is, England has placed the offenders above the law of our jurisdiction, by adopting and approving the same. It is due to her, in the first place, to deny that it has been so adopted and approved. She has approved *a public act of legitimate defence only*. She cannot change the nature of things. She cannot turn that into lawful war which was murder in time of peace. She may, in that way, justify the offender as between him and his own government. She cannot bind foreign courts of justice by insisting that what in the eye of the whole world was a deliberate and prepared attack, must be protected by the law of self defence.

In the second place, I deny that she can, in time of peace, send her men into our territory, and render them impervious to our laws by embodying them and putting arms in their hands. She may declare war: but if she claim the benefit of peace, as both nations have done in this instance, the moment any of her citizens enter our territory, they are as completely obnoxious to punishment by our law, as if they had been born and always resided in this country.

I will not, therefore, dispute the construction which counsel put upon the language or the acts of England. To test the law of the transaction, I will concede that she had by act of parliament conferred all the power which can be contended for in behalf of the Canadian authorities, as far as she could do so; that, reciting the danger from piratical steam boats, she had authorized any colonel of her army or militia, on suspecting that a boat lying in our waters intended illegally to assault the Canadian shore, to send a file of soldiers in the day or night time, burn the boat and destroy the lives of the crew; that such a statute should be executed; but that one of the soldiers failing to make his escape, should be arrested, and plead the act of parliament. Such an act would operate well, I admit, at Chippewa, and until the men had reached the thread of the Niagara river. It would be an impenetrable shield till they should cross

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the line of that country where parliament have jurisdiction. Beyond, I need not say, it must be considered as waste paper. Even a subsequent statute ratifying and approving the original authority could add nothing to the protection proffered by the first. It would be but the junction of two nullities. So says Mr. Locke, (*On Gov. B. 2, ch. 19, § 239,*) of a king even in his own dominions: "In whatsoever he has *no authority*, there he is *no king*, and may be resisted; for where-soever the *authority ceases*, the *king ceases too*, and becomes like other men who have no authority." I shall not cite books to show that the queen of England has no authority in this state in a time of peace.

I will suppose a stronger case: that England being at war with France, should, by statute or by order of the queen, authorize her soldiery to enter our territory and make war upon such French residents as might be plotting any mischief against her. Could one of her soldiers indicted for the murder of a French citizen plead such a statute or order in bar? If he could not as against a stranger and sojourner in our land. I need not inquire whether the same measure of protection be due to Durfee, our fellow citizen.

"The laws of no nation," says Mr. Justice Story, "can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws." (*The Apollon*, 9 Wheat. R. 362, 371, 2.) He has examined the question at large in his book on the Conflict of Laws, (*ch. 2, § 17 to 22, p. 19, of 2d ed.*) The result is, that no nation is bound to respect the laws or executive acts of any foreign government intended to control or protect its citizens while temporarily or permanently out of their own country, until it first declare war. Its citizens are then subject to the laws of war. Till that comes, they are absolutely bound by the laws of peace.

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While this prevails, a foreign executive declaration saying--  
"My subject has offended against your criminal laws; I avow his act: Punish me; but impute nothing to him"—is a nullity. As well might a nation send a company of soldiers to contract debts here, and forbid them to be sued, saying. "The debt was on my account, discharge my men, and charge it over against me!" Indeed, it was even urged on the argument, that the letter of Mr. Fox had taken away the remedy of Wells the boat owner by an action of trespass against McLeod for burning the boat. This action having, it seems, been settled, counsel resorted to it as an illustrative case. Another action brought against him for shooting a horse on the same occasion, it was said, is also defeated by the same principle. Counsel spoke as if Schlosser had undergone a sack, and its booty had become matter of belligerent right in the soldiery. Surely, the imaginations of counsel must have been heated. It seems necessary to remind them again and again, even in affirmance of their own admission, that we are sitting to administer the laws of a country which was at peace with England when she sent in her soldiery. If they mean that the approval and demand in Mr. Fox's letter should, under the law of peace, have the sweeping effect which is claimed for it, they are bound to show that the royal mandate improves by importation. The queen has no power at home to take away or suspend, for a moment, the jurisdiction of her own courts. Nor would a command to discharge any man without trial who should be suspected of having murdered her meanest subject, be deemed a venial error. It is justly a source of the Briton's pride, that the law by which his life and property are protected cannot be suspended even by his monarch; that the sword of justice is holden by her own independent ministers, as a defence for those who do well, but constantly threatening and ready to descend upon the violator of property or personal safety; as the instrument of a municipal law which knows not of any distinction between the throne and the cottage—a law constantly struggling in theory at least, to attain a perfection that shall bring

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all on earth to do it reverence ; " the greatest as fearing its power, and the least as not unworthy of its care."

Much was said on the argument, about the extreme hardship of treating soldiers as criminals, who, it was insisted, are obliged to obey their sovereign. The rule is the same in respect to the soldier as it is with regard to any other agent who is bound to obey the process or command of his superior. A sheriff is obliged to execute a man who is regularly sentenced to capital execution in this state. But should he execute a man in Canada under such sentence, he would be a murderer. A soldier, in time of war between us and England, might be compelled by an order from our government to enter Canada and fight against and kill her soldiers. But should congress pass a statute compelling him to do so on any imaginable exigency, or under any penalty, in time of peace, if he should obey and kill a man, he would be guilty of murder. The mistake is in supposing that a sovereign can compel a man to go into a neighboring country, whether in peace or war, and do a deed of infamy. This is exemplified in the case of spies. A sovereign may solicit and bribe ; but he cannot command. A thousand commands would not save the neck of a spy, should he be caught in the camp of the enemy. (*Vattel*, B. 3, ch. 10, § 179.) It is a mistake to suppose that a soldier is bound to do any act contrary to the law of nature, at the bidding of his prince. (*Vattel*, B. 1, ch. 4, § 53, 4. *Id.* B. 3, ch. 2, § 15. *Grot.* B. 2, ch. 26, § 3, N. 2 and 3. *Puf.* B. 8, ch. 1, § 6, 7.) But if he were, he must endure the evil of living under a sovereign, who will issue such commands. It does not follow that neighboring countries must submit to be infested with incendiaries and assassins, because men are obnoxious to punishment in their own country for being desirous to go through life with bloodless hands and a quiet conscience. The Parisians thought themselves bound to obey Charles IX. when he ordered them to massacre the Huguenots. Suppose they had obeyed a similar order to massacre the Huguenots in England : would such an order

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have been deemed a valid plea, on one of them being arraigned in the queen's bench? It might have been pleaded to an accusation of murder in France—it would have been good, as between the criminal and his own sovereign; but hardly, I suspect, have been deemed so by Queen Elizabeth's judges. The simple reason would have been that Charles IX. had no jurisdiction in England. He might have threatened the government and declared war, if such a meritorious servant, a defender of the church, should not be liberated by the judges. But there is no legal principle on which the decrees of foreign courts, or the legislation of foreign parliaments, could have ousted the judges of jurisdiction. Charles might have ordered his minister to call the massacre a *public act, planned and executed* by himself, he having *authority to defend and protect* his established church; and demanded a release of the man. All this would have added no force to the plea. Neither Elizabeth herself, nor any of the Tudors, arbitrary as the government of England was, would have had power directly to take away the jurisdiction of the judges. Coke, with a law book in his hand, could have baffled the sceptre within its own territorial jurisdiction. It should, in justice, he remarked, that Orte, the governor of Bayonne, and many of his companions in arms, refused to co-operate in the massacre at home, and were never punished for disobedience. He replied to the king, that he had sounded his garrison, and found many brave soldiers among them, but not a single executioner. Suppose a prince should command a soldier to commit adultery, incest or perjury; the prince goes beyond his constitutional power, and has no more right to expect obedience than a corporal who should summarily issue his warrant for the execution of a soldier. (*Vid. Burl. Law of Nature, vol. 1, pt. 2, ch. 11, § 8.*)

Every political and civil power has its legal limits. The autocrat may indeed take the lives of his own subjects, for disobeying the most arbitrary commands; but even his behests cannot impart protection to the merest slave as

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against a foreign government. Public war itself has its jurisdictional limits. Even that, in its pursuit after a flying enemy is, we have seen, arrested by the line of a country at peace. Beside the limit which territory thus imposes, there are also, even in general war, other jurisdictional restraints, as there are in courts of justice. An order emanating from one of the hostile sovereigns will not justify to the other every kind of perfidy. The case of spies has been already mentioned. An emissary sent into a camp with orders to corrupt the adverse general, or bribe the soldiery, would stand justified to his immediate sovereign, (*Vattel*, B. 3, ch. 10, § 180;) though even he could not legally punish a refusal. In respect to the enemy, the orders would be an obvious excess of jurisdiction. The emissaries sent by Sir Henry Clinton in 1781 to seduce the soldiers of the Pennsylvania line, falling into the hands of the Americans, were condemned and immediately executed. (4 *Marsh. Life of Washington*, 366, 1st ed.) Entering the adverse camp to receive the treacherous propositions of the general, is an offence much more venial. It is even called lawful, in every sense, as between the sovereign and employee. (*Vattel*, B. 3, ch. 10, § 181.) Yet, in the case of Major Andre, an order to do so was, as between the two hostile countries, held to be an excess of jurisdiction.

These cases are much stronger than any which can be supposed between nations at peace. In time of war, such perfidy is expected. In time of peace, every citizen, while within his own territory, has a double ground for supposing himself secure—the legal inviolability of that territory, and the solemn pledge of the foreign sovereignty.

The distinction, that an act valid as to one may be void as to another, is entirely familiar. A man who orders another to commit a trespass, or approves of a trespass already committed for his benefit, may be bound to protect his servant, while it would take nothing from the liability of the servant to the party injured. As to him, it could merely have the effect of adding another defendant, who

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might be made jointly or severally liable with the actual wrong-doer. A case in point is mentioned by Vattel, (*B. 3, ch. 2, § 15.*) If one sovereign order his recruiting officer to make enlistments in the dominion of another, in time of peace between them, the officer shall be hanged notwithstanding the order, and war may also be declared against the offending sovereign. (*Vid. a like instance, id. B. 1, ch. 6, § 75.*)

What is the utmost legal effect of a foreign sovereign approving of a crime which his subject has committed in a neighboring territory? The approval, as we have already in part seen, can take nothing from the criminality of the principal offender. Whatever obligation his nation may be under to save him harmless, this can be done only on the condition that he confine himself within her territory. (*Vattel, B. 2, ch. 6, § 74.*) Then, by refusing to make satisfaction, to punish, or to deliver him up, on demand, from the injured country, or by approving the offence, the nation, says Vattel, becomes an *accomplice*: (*Id. § 76:*) Blackstone says, an *accomplice* or *abettor*, (*4 Com. 68;*) and Rutherford, still more nearly in the language of the English law, *an accessory after the fact*. (*B. 2, ch. 9, § 12.*) No book supposes that such an act merges the original offence, or renders it imputable to the nation alone. The only exception lies in the case of a crime committed by an ambassador; not because *he* is guiltless, but by reason of the necessity that he should be privileged, and the extra territorial character which the laws of nations has, therefore, attached to his person. Hence say the books, he can be proceeded against no otherwise than by a complaint to his own nation, which will make itself a party in his crime if it refuse either to punish him by its authority, or to deliver him up to be punished by the offended nation. (*Ruth. B. 2, ch. 9, § 20.*) Independently of this exception, therefore, Rutherford insists, with entire accuracy, that "as far as we concur in what another man does, so far the act is our own; and the effects of it are chargeable upon us as well as upon him."



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(*Ruth. B. 1, ch. 17, § 6.*) A nation is but a moral entity; and, in the nature of things, can no more wipe out the offence of another by adopting it, than could a natural person. And the learned writer just cited accordingly treats both cases as standing on the same principle. (*B. 2, ch. 9, § 12.*) "Nothing is more usual," says Pufendorf, "than that every particular accomplice in a crime be made to suffer all that the law inflicts." (*B. 3, ch. 1, § 5.*) Vattel says, of such a case, (*B. 2, ch. 6, § 75,*) "If the offended state have the offender in her power, she may without scruple punish him." Again, if he have escaped and returned to his own country, she may apply for justice to his sovereign, who ought, under some circumstances, to deliver him up. (*Id. § 76.*) Again, he says, "she may take satisfaction for the offence herself, when she meets with the delinquent in her own territories." (*B. 4, ch. 4, § 52.*) I before cited two instances in which positive orders by his sovereign to commit a crime, are distinctly held to render both the nation and its subject obnoxious to punishment. (*Vattel, B. 3, ch. 2, § 15. Id. B. 1, ch. 6, § 75. Vid. also 1 Burl. pt. 2, ch. 11, § 10.*)

Was it ever suggested by any one before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offence? nay, that the coalition of great power, with great crime, does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrator can be reached?

Could approbation and avowal have saved the unhappy Mary Queen of Scots, where would have been the civil jurisdiction of Elizabeth's commissioners? The very charge of an attempt by Mary to dethrone and assassinate the British queen, implied the approbation and active concurrence of one crowned head at least. Could the criminal have been saved by any such considerations, the enterprize might truly have been avowed as one which had been planned by the leading governments of catholic Europe. The pope, then having at least some pretensions to juris-

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diction *even in England*, had openly approved it under his seal. The Spanish ambassador at Paris was a party relied upon to follow up the event with an invasion. Would James, the son of the accused, have hesitated to join in the avowal, could he have thus been instrumental in saving the life of his mother? Yet the principle was not thought of in the whole course of that extraordinary affair. Mary openly avowed her general treason as a measure of *defence* and *protection* to herself, though she denied all participation in the plot to assassinate Elizabeth. Yet the only ground taken, was the technical one (not the less valid because technical) that the accused was personally privileged as a monarch and could not be tried under the English law which required a jury composed of her peers. It was added, that she came into the kingdom under the law of nations, and had enjoyed no protection from the English law, having been continually kept as a prisoner. (Vid. the case stated and examined in the light of international law, 2 *Ward's L. of Nations*, 564.) No one pretended that her approbation, or that of a thousand monarchs, could have reflected any degree of exemption from judicial cognizance, upon the alien servants in her employment. Such a principle would have filled England with an army, in time of peace, disguised as Jesuits; for the bigotry of monarchs would, at that day, have led them to avow any system of pernicious espionage which could have served the purposes of the pope by executing his bull of excommunication against Elizabeth.

Canada again being disturbed, and our citizens aiding the revolt by boats, provisions or money, the purposes of England would certainly require such conduct to be put down at all events. Adopt the principle, that she may by avowal protect her soldiery, who steal upon our citizens at midnight, from all punishment at the common law, and before you could get even a remonstrance from Washington, your whole frontier might be made a *tabula rasa*. No. Before England can lawfully send a single soldier for hostile purposes, she must assume the responsibility of public war.

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Her own interests demanding the application of the rule, she perfectly understands its force. What regard have her courts ever paid to the voice of public authority on this side the line, when it sought to cover even territory to which the United States denies her title? The mere act of taking a census in the disputed territory under the authority of Maine, was severely punished by the English municipal magistrates. Had a posse of constables or a company of militia bearing muskets been sent to aid the censor, in what book or in what usage could she have found that this would divest her courts of jurisdiction, and put the cabinet of St. James to a remedy by a remonstrance or war? Had the posse been arrested by her sheriff, and in mere defence had killed him, and this nation had, after some two or three years, avowed the act, would she have thought of conceding that, in the mean time, all power of her courts over the homicides had been suspended, or finally withdrawn?

But it is said of the case at bar, here is more than a mere approval by the adverse government; that an explanation has been demanded by the secretary of state, and the British ambassador has insisted on McLeod's release; and counsel claim for the *joint* diplomacy of the United States and England some such effect upon the power of this court as a certiorari from us would have upon a county court of general sessions. It was spoken of as incompatible with a judicial proceeding against McLeod in this state; as a suit actually pending between two nations, wherein the action of the general government comes in collision with, and supersedes our own.

To such an objection the answer is quite obvious. Diplomacy is not a judicial, but executive function; and the objection would come with the same force, whether it were urged against proceeding in a court of this state or the United States. Whether an actual exertion of the treaty-making power, by the president and senate, or any power delegated to congress by the federal constitution, could work the consequences contended for, we are not called upon to enquire. Whether the executive of the nation, (sup-

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posing the case to belong to the national court,) or the executive of this state might not pardon the prisoner, or direct a *nolle prosequi* to be entered, are considerations with which we have nothing to do.

The executive power is a constitutional department in this, as in every well organized government, entirely distinct from the judicial. And that would be so, were the national government blotted out, and the state of New-York left to take its place as an independent nation.

Not only are our constitutions entirely explicit in leaving the trial of crimes exclusively in the hands of the judiciary; but neither in the nature of things, nor in sound policy, can it be confided to the executive power. That can never act upon the individual offender; but only by requisition on the foreign government; and in the instance before us, it has no power even to inquire whether it be true that McLeod has personally violated the criminal laws of this state. It has charge of the question in its national aspect only. It must rely on accidental information, and may place the whole question on diplomatic considerations. These may be entirely wide either of the fact or the law as it stands between this state and the accused. The whole may turn on questions of national honor, national strength, the comparative value of national intercourse, or even a point of etiquette.

Upon the principle contended for, every accusation which has been drawn in question by the executive power of two nations, can be adjusted by negotiation or war only. The individual accused must go free, no matter to what extent his case may have been misapprehended by either power. No matter how criminal he may have been, if his country, though acting on false representations of the case, may have been led to approve of the transaction and negotiate concerning it, the demands of criminal justice are at an end.

Under circumstances the executive power might, in the exercise of its discretion, be bound to disregard a venial offence as no breach of treaty, which the judiciary would

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be obliged to punish as a breach of international law. Suppose some of our citizens to attack the British power in Canada, and the queen's soldiers to follow the heat of repelling them by crossing the line and arresting the offenders, doing no damage to any one not actually engaged in the conflict. The line being absolutely impassable in law for hostile purposes, the arrest on this side would be a technical false imprisonment, for which we should be bound to convict the soldiers if arrested here; while the executive power might overlook the intrusion as an accidental and innocent violation of national territory. (*Vatt. B. 4, ch. 4, § 43.*)

I forbear now to notice particularly some of the legal passages and cases which were referred to by the prisoner's counsel in the course of the argument; not for the reason that I have omitted to examine them, but because I consider them inapplicable under the views I have felt it my duty to take of the prisoner's case. They were principally of three classes: first, passages from books on the law of nations as to what is public war, and the protection due to soldiers while engaged in the prosecution of such a war by their sovereign against a public enemy; secondly, the general obligations of obedience as between him and his sovereign, whether in peace or war; and thirdly, cases from our own books relative to the conflicting powers of the general and state governments. The case of *Elphinstone v. Bedreechund*, (1 *Knapp's Rep.* 316,) related to the breach of an actual military capitulation entered into during an acknowledged public war between England and one of the petty sovereignties of India.

In considering the question of jurisdiction, I have also forbore to notice that branch of the affidavit which sets up an *alibi*. McLeod's counsel very properly omitted to insist on it as at all strengthening the claim of privilege. Indeed they said the clause was put in merely by way of *protestando*. If it was inserted with the intention of having it taken as true upon this motion, that alone would destroy all pretence for any objection to our jurisdiction. His sur

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render was demanded upon the hypothesis that he was acting under public authority. If in truth he was not, or was not acting at all, he enjoys according to his own concession no greater privilege than any other man. The essential circumstance relied on as going to the question of jurisdiction, turns out to be fictitious; and the argument must be that we have no power to try the question of *alibi*. On that and every other lawful ground of defence he will be heard by counsel on his trial.

It is proper to add, that if the matters urged in argument could have any legal effect in favor of the prisoner, I should feel entirely clear that they would be of a nature available before the jury only. And that, according to the settled rules of proceeding on *habeas corpus*, we should have no power even to consider them as a ground for discharging the prisoner. I took occasion to show in the outset, that in no view can the evidence for the prosecution or the defence be here examined, independently of the question of jurisdiction, and I entertain no doubt that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction.

I know it is said by the English books, that even in a case of mixed war, viz. a hostile invasion of England by private persons, the common law courts have not jurisdiction. It was so held in Perkin Warbeck's case. He was punished with death by sentence of the constable and marshal, who it is said in Calvin's case, (7 Co. Rep. 11, 12,) had exclusive jurisdiction. (S. P. 1 Curw. Hawk. ch. 2, § 6, p. 9. See Dy. 145, a.) But that rests on a distribution of judicial power entirely unknown to this state or this nation. The court of the constable and marshal seems to have had an ancient right not very well defined by the common law, of trying all military offences, as appears by the Stat. R. 2, ch. 2, (vide 2 Pick. St. at Large, p. 310,) which was passed to settle conflicting claims of jurisdiction between that and the ordinary courts. (Vide also 3 Inst. 48.) The whole is obviously inapplicable to this country; and

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## BUTLER &amp; BARKER vs. VAN WYCK.

Since the decision of the court for the correction of errors in *Smith & Hoe v. Acker*, (23 *Wend.* 653,) if there is evidence that a mortgage of chattels was given for a true debt, the question of fraud as to creditors, arising from continued possession in the mortgagor, must be submitted to the jury, whether such possession be satisfactorily explained or not; and a verdict either way will conclude the parties. And *semble*, the rule is the same where a like question is raised upon a bill of sale absolute on its face.

*Quere*, whether the court of chancery is not still left to act upon the doctrine as formerly understood in reference to questions of this character.

BRONSON. J. dissented, holding that though the decision in *Smith and Hoe v. Acker*, was binding on the parties to the particular suit, it should not be followed as a precedent.

REPLEVIN, tried before RUGGLES, C. Judge, at the Dutchess circuit in October, 1839. The plaintiffs are paint, oil and dye wood merchants in the city of New-York. Prior to 1837, Washington Davids kept a paint and oil store, and was engaged in the business of house painting in Poughkeepsie. In 1837, Davids kept a tavern called the *Forbus House*, in Poughkeepsie, where he continued until April, 1838, when he removed to and kept another public house in the same village, called the *Mansion House*. On the 19th June, 1837, Butler, one of the plaintiffs, went to Poughkeepsie and presented an abstract or statement of moneys claimed to be due the plaintiffs from Davids, who thereupon gave the plaintiffs a bond conditioned for the payment of \$2355,34, the balance claimed—payable, one third in twelve, one third in eighteen, and one third in twenty-four months, with interest. Davids at the same time executed to the plaintiffs a *mortgage*, with the like condition, of the carpeting, matting, chairs, tables, looking-glasses, settees, beds, bedding and bedsteads, spoons, knives, forks, candlesticks, crockery and glass ware, beer-pump, and other furniture of the *Forbus House*, which Davids was then keeping, together with some other property. The mortgage was filed pursuant to *Statutes of 1833*, (ch. 279.) *Stephen Cleveland*, a counsellor

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at law, was consulted by the plaintiffs at the time the papers were executed. He testified that he was then a boarder with Davids; that it was agreed between the plaintiffs and Davids, that the property should be *deemed* to be in witness' possession, and it was put in his possession as the agent of the plaintiffs so far as it could be so without a removal, and it was agreed that the property should be under his control. The property was not removed and no actual delivery took place, otherwise than as above stated. Cleveland used as much of the property as was necessary in the rooms which he and his family occupied as boarders. When Davids removed to the *Mansion House*, about the 1st of April, 1838, he took nearly all the property with him, and all of it was carried there within a month, where it was used by Davids, except some few things which were boxed up by order of Cleveland. Cleveland did not remove with Davids to the Mansion House.

In May, 1838, *Pascal B. Smith* recovered a judgment in this court against Davids, in an action upon promises, for \$333,73; and on a *fi. fa.* issued upon that judgment, the defendant, as sheriff of Dutchess, levied on the property in question on the 18th August, 1838; the property then being in the Mansion House and in the use of Davids. The defendant did not take any property which had been boxed up. The plaintiffs thereupon brought this action of replevin.

The plaintiffs gave in evidence an account, and a letter in their handwriting directed to Davids, dated 9th January, 1837, and post marked "New-York, Jan. 9." The account stated a balance of \$2293,78, as due the plaintiffs—and the letter called on Davids for a remittance. The plaintiffs also gave in evidence several letters or bills, in their handwriting, purporting to be bills of paints sold to Davids in the years 1835 and 1836. All of these papers were produced by the witness Cleveland, who said he received them from Davids after the mortgage was executed, and before this suit was commenced. They were admitted in evidence, subject to the objection that they were inad-



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missible, as being, at least, evidence made by the plaintiffs themselves.

The plaintiffs insisted that the matters given in evidence should be submitted to the jury. But the judge said, as there was no change of possession, the mortgage was invalid against the execution creditor, and directed the jury to find a verdict for the defendant. The plaintiffs excepted. Verdict for defendant; and the plaintiffs now move for a new trial.

*S. Barculo*, for plaintiffs.

*Wilkinson & Street*, for defendant.

COWEN, J. The cause was put to the jury on the ground of possession continuing in the mortgagor; and the question is, therefore, the same in effect as if there had been actual proof tending to show that the bond and mortgage were given to secure a true debt. There was no change of possession, nor any excuse expressly set up for not changing it. It was however obviously for the convenience of Davids to keep possession, and it might have helped him in his business.

The judge was clearly right, according to the decisions of this court, and the uniform current of judicial authority from *Twyne's case*, (3 Rep. 80,) in the reign of Elizabeth, down to but not including *Smith & Hoe v. Acker*, decided by the court for the correction of errors in December term, 1840. (23 Wend. 653.) Several cases are before us on possession of goods by insolvent debtors after a bill of sale or mortgage, both being, as is well known, placed by our statute on the same footing in respect to the evidence of fraud derivable from such possession. Some of these cases were argued or submitted before and some since the decision by the court of errors, which is now urged upon us as subverting the ancient doctrine of the courts, by requiring the question of fraud to be submitted to the jury, and making their decision final and conclusive in all cases. I have accordingly

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looked into that case, and am of opinion that it has not been materially misunderstood by counsel who contend for the absolute power of the jury. This, I think, will be obvious from a brief review of it; and, at any rate, it will be clearly seen that it was considerably stronger in favor of the execution creditor than the one now before us. Yet the court of errors forbade the interference of the judge, and said the case belonged to the jury.

In that case the plaintiffs, Smith & Hoe, claimed as mortgagees of a valuable printing apparatus (presses, types, &c.) in the city of New-York, where both parties resided. The mortgage was executed by one Bell, an insolvent debtor, and included also his household furniture at two houses in the city. It was professedly taken to secure a debt of \$10,000. The whole was described in a schedule attached to the mortgage, without any value being affixed; and no appraisal was made at the time, though a witness stated that he afterwards estimated the printing materials at \$10,000. No estimate appeared to have been at any time set on the furniture; and some of it was described as consisting of lots or parcels. The money was professedly secured to be paid in about one month. The mortgage was filed. It contained a covenant that, till default in payment, the whole should remain in the possession and enjoyment of the mortgagor. The apparatus remained in his office and the furniture at his houses in the city, (though, as alleged, he had paid none of the money said to be due,) till some time in January, 1838, when the sheriff levied on one of the printing presses to satisfy an execution for a small debt due to Mr. Voorhis. A witness stated that had a sale of the apparatus been forced at auction in the meantime, it would not have brought 20 per cent. of its real value; and that Bell was allowed to retain possession, and was assisted in his business by the plaintiffs, in the hope that he might be enabled to pay his creditors. Business was in the meantime dull; and Bell was sick in the summer and fall, and when the sheriff came to levy. No reason whatever was given for leaving the furniture with Bell, which was appa

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rently valuable and equal to a handsome domestic establishment in the city, allowing not only for a scale of convenience, but elegance. Parol evidence was given of a balance on book account in favor of the mortgagees, against Bell, of about \$10,000; and it was claimed that the mortgage had been given to secure this balance.

The cause was tried on these facts, in the New-York common pleas, where the mortgagees had brought replevin against the sheriff. At the close of their evidence before the jury, that court thought the transaction such a palpable device to delay, hinder, or defraud Bell's creditors, that they refused to submit the case to the jury; and nonsuited the plaintiffs. On error to this court we thought the court below were clearly right and affirmed the judgment. Our judgment was reversed by the court of errors, which held that the question was one of *actual fraud* for the jury.

It will be perceived, that here was such a possession by the mortgagor as the statute (2 R. S. 70, 2d ed. tit. 2, § 5,) declares to have been presumptively, indeed conclusively fraudulent and void as against the levying creditor, *unless it was shown on the part of the plaintiffs that their mortgage was made in good faith, and without any intent to defraud creditors.* The fourth section of the next title declares, that the question of fraudulent intent in such case is one of fact and not of law. A brief examination of the principle and history of our decisions under these statutes, will exhibit more clearly the difference between the construction which we have placed upon them, and that adopted by the court of errors.

We understood the statutes, not as narrowing and weakening, but rather as extending and strengthening the rules of evidence which had before been adopted for the detection and suppression of fraud. Section one, of title three, is a re-enactment of the 13 *Eliz.* Section five, of title two, puts absolute bills of sale and mortgages of goods on the same footing, declaring that both shall be presumptively fraudulent, and conclusively so unless proved to have been made in good faith and without any intent to defraud

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The case cited from 3 *Rep.* 80, arose under 13 *Eliz.* on a sale to Twyne in satisfaction of a debt, the vendor being indebted to others, and continuing in possession, as Bell had done in *Smith & Hoe v. Acker*. All the judges of England resolved, (*p.* 81,) that notwithstanding here was a *true debt* due to Twyne, and a *good consideration* of the gift, yet it was not *bona fide*; for no gift shall be deemed to be *bona fide* which is accompanied with any trust, as if the donee allow the donor to continue in possession, &c. The rule of this case having long prevailed, and having been extended, as we understood the revised statutes, to mortgages as well as sales, we held in both instances, that the proof of a *true debt* taken by itself, did not tend to shew that the sale or mortgage was *bona fide*. We required, in addition, that some extraordinary reason should be shown for the continuance of possession; and not merely such as may always be set up and established by a wary insolvent, and his mortgagee or vendee; and that if something more were not shown, proof of a real consideration came short of the mark, and amounted to nothing. We proceeded on the ground deduced by Mr. Roberts, from Twyne's case, viz: "That evidence of the fraudulent intent supersedes the whole inquiry into the consideration; for no merit in any of the parties to a transaction can save it, if it carry intrinsically or extrinsically the plain characters of fraud." (*Roberts on Fraud. Conv.* 548.) Twyne's case specifically denied all force to one very common excuse. At *p.* 81, the report declares, that a sale leaving the goods with the vendor with intent to favor him, being content that he should pay the debt when he got able, should not be deemed *bona fide*. Accordingly, an excuse that the goods were left for the accommodation or convenience of the insolvent vendor, has been repeatedly disallowed. (*Gardner v. Adams*, 12 *Wendell*, 297. *Doane v. Eddy*, 16 *id.* 253. *Randall v. Cook*, 17 *id.* 53.) So, that he retained the use and possession to enable him the better to pay the debt due the mortgagee. (*Beekman v. Bond*, 19 *Wendell*, 444.) The principle of these decisions was, as

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already mentioned, that the excuses were such as could be manufactured by the parties at pleasure, and always would be. These and the like reasons for retaining possession can always be proved. Most of them are self-evident; and if not, the parties can express and make a show of them at the time, and so prove them by witnesses. Being matters by which they may always cover and disguise the transaction, we thought them of no force, and not such evidence as should go to the jury. In this we proceeded on the rule that though a question be one of fact, yet whether the evidence offered may tend to its elucidation, is always a question of law for the judge.

Having thus noticed the principles on which our decisions proceeded, it becomes necessary to inquire how far they were overruled by the court for the correction of errors in *Smith & Hoe v. Acker*. The excuses set up by Bell's mortgagees were of a character which the parties to an insolvent's mortgage may always bring into the case and make out in proof; and if such are fit to be submitted to a jury, as relevant evidence, it follows that every other excuse within the power of the parties to invent must also be deemed relevant. The presiding judge has no discretion; but is bound to submit the alleged excuse to the jury as a part of the evidence to be considered and allowed or disallowed by them, as they shall think meet. The line which has heretofore been maintained in this respect between the relevancy and the weight of evidence has been obliterated; and both have been confided to the jury. The court for the correction of errors held this anomaly as matter of construction on the declaration of the fourth section of title three, that the question is one of *fact* and not of *law*. Senator Hopkins, who delivered the only opinion in that case coming fully up to the principle which alone can be considered as governing the decision, in speaking of this provision, said it seemed unnecessary to look into the previous state of the law. He admitted that the *onus probandi* was thrown upon the persons claiming under the sale or mortgage. But in his enumeration of the matters tending to discharge

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that *onus*, I find much alluded to as admissible which had not been deemed so under the previous state of the law; but nothing specifically which the judge would be authorized to reject as irrelevant. Indeed in looking through the evidence and considering it in the light of any judicial rule for weighing it which I remember to have seen laid down before, I have been at a loss to find an excuse that the mortgagees could have set up, which did not rather tend to increase the presumption against them already raised by the statute.

The two prominent excuses seem to have been, 1. That Bell was insolvent, and, by keeping his property, he would the better be enabled to pay his debts; and 2. That a forced sale at auction would have brought less for the property. The former reason had no application to the valuable household furniture; and if allowed by the law on the ground that the mortgagor might make a profit by keeping his tools and implements of business, and so possibly pay his creditors some time or other, that would go to save every insolvent's property for his own use. The excuse would always be true at the time, and might continue to be so during his whole life. Bell and his mortgagees might as well have agreed on a credit and possession for years, and extended the time still for years beyond the day of payment. That a forced sale would have brought less than a leisurely one, is equally applicable to all property. But that was an argument rather for than against a change of possession. A change would have enabled the mortgagees more readily to exhibit the property, and seek opportunities for an advantageous sale, which the mortgage stipulated they might do. That they were occasionally aiding Bell by advances, thus keeping up the balance due on book, and giving him color for opposing the claims of small execution creditors like Voorhis, was a bad earnest of the pretended purpose to pay debts. The sickness of Bell in the summer and fall, and in January when Voorhis came with his execution, was also mentioned. But if this excuse were admissible at all, it had no existence when the mortgage

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was given, nor when the default in payment was made. In the face of the statute, the mortgagees, so far from the thought of taking the property, actually disqualified themselves from doing so till the first of May, by a covenant that it should remain for the exclusive enjoyment of Bell. From that day they waited till he became sick. He was in a state of imbecility which they admit called for their farther assistance, and must have sunk him deeper in debt. Independently of sickness, the argument is far from being solid, that a solvent man who in good times with a flourishing business wanted forecast to avoid insolvency, could be entrusted to recover himself by the management of a sinking fund in bad times with a narrowed business and laboring under the distrust of community.

The evidence did indeed tend to show that the mortgage was given at the time to secure a *bona fide* debt. But even this evidence, which the law has never heretofore regarded as a sufficient explanation when standing alone, was far from being satisfactory. The debt was proved to rest in a book account, which does not appear even to have been produced at the trial. But if the book account had been produced and had shown a debt of exactly \$10,000, that would have been far from conclusive. It is very easy for an insolvent and his mortgagee to keep up appearances of a large balance on book or otherwise, whether there be really one or not. A fraudulent mortgage generally assumes a round sum, convenient to cover the property, avoiding to break dollars or even hundreds or thousands; and the only way for creditors to meet the assumption, is on facts like those disclosed in the case before the court of errors.

Without going farther into particulars, it seems to me that, with the single exception of evidence to support the consideration of the mortgage, the presumption of fraud arising from Bell's possession, would be considered as rather fortified than weakened, if any of the old rules of evidence were left to us.

In holding that such a case must be submitted to the jury, the court of errors virtually decided that a verdict in

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favor of the mortgagees could not with propriety have been disturbed by the court below. If that court had not power to nonsuit, it follows that they could not have granted a new trial, had the jury found a verdict for the plaintiffs. In short, the court of errors must have considered the power of the jury as absolute in almost every conceivable case.

The mortgage of Bell was duly filed, according to the requisition of 2 *R. S.* 71, 2d ed. § 9. But both Senators Hopkins and Edwards expressed a clear opinion that this circumstance did not mitigate the force of the presumption against the mortgagees which would otherwise have arisen under section five. Those opinions accord with the settled doctrine of this court. (*Wood v. Lowry*, 17 *Wendell*, 492.) The decision in *Smith & Hoe v. Acker*, thus being made irrespective of section nine, must therefore be received to govern our judicial action on absolute sales attended with circumstances similar to those in evidence respecting the Bell mortgage. This results from both sales and mortgages being put on the same footing by section five.

Under the construction which the court of errors have thus thought it their duty to give the fourth section of title three, creditors cannot, I think, any longer look for the direct action of this court in deciding on the usual *indicia* of fraud. The question must, in almost every case, begin and end in the court of original jurisdiction when it arises on the common law side. I speak not of the court of chancery. That court is perhaps left to govern itself by the ancient rules. But it seems to me that where there is a trial by jury, whether at the circuit, in the common pleas, or in a justice's court, the law must be considered as confiding little if any thing more than a mere advisory control to the presiding tribunal; and that therefore, a review of the question on motion for a new trial, or in any form which presupposes the existence of controlling rules of evidence, is pretty much at an end. Perhaps it is necessary for the vendee or mortgagee claiming in the face of a continued possession in his vendor or mortgagor, to



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give evidence, slight at least, that the consideration was a true debt. But beyond this, the verdict of the jury must be received as final. The convenience of the vendor or mortgagor, the declared purpose of enabling him to pay debts, even the comfort of his family in retaining household furniture according to their rank in life ; in short, motives of humanity, and almost of mere courtesy, may, I think, on the authority of *Smith & Hoe v. Acker*, be given in evidence to the jury, who may, if they please, allow them as legitimate excuses. But whether allowed or rejected, the court cannot interfere. This is most clearly so, as I have entirely satisfied myself on examining the circumstances of *Smith & Hoe v. Acker* ; and my conclusion will, I think, be found as clearly supported by the general scope of Senator Hopkins' argument ; and by many of his particular expressions. He says, indeed, that the court are to decide questions of relevancy ; but he does not, as I before suggested, admit that any one circumstance, before that time held irrelevant, is any longer to be considered so ; the case itself shows that it is not ; and he expressly mentions several instances in which facts before held to be irrelevant, are no longer so ; such as, that the mortgagor required the property mortgaged in his business, and to aid in his earnings for the payment of debts and the support of his family. And he concludes by saying, the jury must decide the question according to their own convictions as one of *actual fraud*. It seems to me that the rules cited from Twyne's case, in Lord Coke's reports, and all the decisions following them, down to and including our own, are stricken from existence ; and the question comes nearly, if not quite, to one of *actual mental fraud*, to be finally disposed of by the jury. The case before the court of errors was the very strongest which could be presented as a test of the ancient rules, and the learned senator who gave the prevailing opinion, expressed himself as became him, clearly and strongly. He said at the outset, that his vote would directly conflict with our whole course of decision. It did so ; and I feel bound to consider the case of the same force as

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If the whole court had in terms overruled all our decisions in detail. It virtually says, that in *Doane v. Eddy*, (16 *Wendell*, 523,) the jury might have allowed the mortgagor to keep his mare and use her. So in *Randall v. Cook*, (17 *id.* 53,) they might have sanctioned the mere wish of the mortgagor and the consent of the mortgagee, that the former should continue the use of the property. So, under the bill of sale and mortgage in *Wood v. Lowry*, (*id.* 492.) So, the retaining of the boat by the insolvent mortgagor in *Beekman v. Bond*, (19 *id.* 444,) to enable him by its earnings to pay the mortgage debt. So, possession after the sale in *Gardiner v. Tubbs*, (21 *id.* 169;) since a mortgage and absolute sale stand on the same footing. Indeed an absolute sale may be made a more effectual instrument of fraud, for it need not be deposited in the clerk's office, as a mortgage must. In *Gardner v. Adams*, (12 *id.* 297,) a *bureau* was left with the mortgagor for his accommodation. That was denied to be a sufficient excuse. This case must now also be taken as overruled.

In the case before us, Butler was somewhat shy of avowing his consent to leave the furniture with Davids for his use; but there was no need of his being so. Davids retained it obviously because it was convenient, and one of the mortgagees consented. Another excuse might have been effectually urged upon the jury, viz. that it enabled Davids the better to carry on his business and earn money to pay his debts. The court of errors hold, in so many words, that the jury may allow either. Bell's retaining his furniture, was less important. The parallel is more striking between Davids' furniture and Bell's printing apparatus, for each was necessary in their respective business. The mere accommodation of the vendor or mortgagor, may now be allowed by the jury as a sufficient excuse.

On the whole, I think the case now before us was disposed of on rules of evidence which were repudiated by *Smith & Hoe v. Acker*; and my opinion, therefore, is, that there should be a new trial, the costs to abide the event.

NELSON, Ch. J. concurred.

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BRONSON, J. dissenting. The pretence that this tavern furniture was in the possession of one of the boarders in the house, and not in the custody of the keeper of the inn, shows to what poor shifts men will resort for the purpose of evading the law, and getting rid of the payment of their debts. There was no change of possession. Nothing was done beyond an attempt, by creating a formal paper lien, to place the goods beyond the reach of legal process.

If the plaintiffs were, in fact, creditors of Davids, they neither sued for their debt, nor did they take the whole or any portion of his property in satisfaction of the demand. They were content that their debt should remain unpaid, and that the insolvent debtor should go on, as he had before, in the full enjoyment of property which rightfully belonged to his creditors. This is not all. The plaintiffs were not only content to forego their own rights, but they were willing to lend further aid to the debtor by taking a nominal conveyance of his effects, and thus stepping in between him and those creditors who might resort to legal coercion for the recovery of their demands.

It requires but a moderate knowledge of human affairs to understand how men reason in cases of this character. It is but too commonly the case that the insolvent debtor is unwilling to surrender the remnant of his estate to the creditors from whom it was obtained, and to whom it rightfully belongs; and looking upon that man as a tyrant who says, "Pay me what thou owest," he is soon able to persuade himself that it is justifiable to defeat the oppressor by any means which wear the semblance of legal authority. He sometimes contents himself with giving a preference to a favored creditor, by confessing a judgment, or by making an actual transfer of his effects; and this the law tolerates. But as that course involves the necessity of giving up his property, he more commonly resorts to some contrivance by which, under the forms of law, he hopes to retain the undisturbed enjoyment of his goods while the execution creditor is defeated. This device is a mortgage or bill of sale of his personal effects. He casts about for

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some relative or friend who either has or pretends to have a debt, and who will consent to receive a conveyance with the understanding, either express or implied, that the property is not to be removed; and having signed the deed and deposited it in the clerk's office, the debtor goes on with his affairs just as though nothing had happened, and sets at defiance those creditors who may be so unreasonable as to insist on the payment of their demands. Now gloss this over as we may, it is nothing but a scheme "to delay, hinder and defraud creditors," which the statute law for nearly three centuries, and the common law at all times, has declared utterly void.

Questions of this kind have so frequently been before us, and we have so often held these pretended transfers of personal property void as against creditors and purchasers, that I shall spend no time in reviewing the decisions. Without noticing other features in this case, it is enough that there was no change of possession. That fact alone, according to the law of the land as settled by many judicial decisions, was sufficient to invalidate the mortgage as against an execution creditor, and a new trial should therefore be denied.

But we are referred to a recent decision of the court for the correction of errors, in the case of *Smith & Hoe v. Acker*, (December, 1840,)\* as laying down a different doctrine, and as being moreover a decision of paramount authority. I have procured copies of the papers in that case, and a newspaper copy of the only opinion delivered in favor of the judgment which was rendered by the court for the correction of errors; and it must be admitted that a new doctrine was laid down in that case. Indeed, the learned senator who delivered the prevailing opinion, commenced by

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\*That case has been reported (23 *Wendell*, 653,) since this opinion was prepared. It is proper to add: that although other opinions are now published, Mr Senator HOPKINS delivered the only written opinion, as is said, in favor of the judgment which was rendered by the court for the correction of errors in that case, and to his opinion reference is made on the present occasion.

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saying, "My vote will directly conflict with the whole course of decisions of the supreme court upon the principal question." That this avowed departure from the law as it had been previously settled, has made a precedent of "paramount authority," I most respectfully deny. Let us notice very briefly what the case was, and how it was disposed of.

Looking at the case in the most favorable light for the plaintiffs, Smith & Hoe, they were creditors of Bell in the sum of ten thousand dollars, and Bell on the 26th of March, 1837, gave them a mortgage on his printing press, types, household furniture and other property, conditioned for the payment of ten thousand dollars, with interest, on the first day of May then next, with a provision that until the debtor should make default in payment, he should "remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same." Bell continued in possession of the property until the 20th of January, 1838, when the defendant Acker, sheriff of New-York, levied on the printing press, by virtue of an execution in favor of Abraham Voorhis; and for that taking an action was brought in the New-York common pleas, where the plaintiffs were nonsuited. The judgment of the common pleas, after being affirmed in this court, was reversed by the court for the correction of errors, on the ground that the question of fraud should have been submitted to the jury.

Without mentioning any other feature calculated to throw discredit on the *bona fides* of the transaction, I will only notice three leading facts: *First*, there was no change of possession; *second*, it was expressly stipulated that there should be no change until default should be made in payment; and *third*, the debtor remained in possession until the execution was levied, which was nearly nine months after the mortgage had become forfeited by a default in payment. Now it was said so long ago as *Twyne's case*, (3 Co. R. 80,) that "continuance of the possession in the donor is a sign of a trust;" and it was resolved, "that notwith-

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standing here was a true debt due to Twyne, and a good consideration of the gift," yet the transaction was not *bona fide* within the proviso to the act of 13 *Eliz.*, because there was a trust that the donor should remain in possession. In the case of *Smith & Hoe v. Acker*, there was not only the "sign of a trust," but there was an *express* trust between the parties. Bell was not to be disturbed in the enjoyment of the property. This privilege must have been worth at least seven hundred dollars a year—the interest upon the value of the property mortgaged—to say nothing of the deterioration of the goods by time and continued use. If we stop here, this decision, if followed, will not only upset all the adjudications on this subject under the revised statutes, but it will overthrow many precedents of a much more ancient date.

But let us proceed a step further. Assuming that Bell's mortgage was originally valid, all his interest in the property became forfeited by the non-payment of the money on the first of May in pursuance of the condition, and the title of the mortgagees thereupon became absolute. (*Langdon v. Buel*, 9 *Wendell*, 80. *Patchin v. Pierce*, 12 *id.* 62.) What was before a mortgage, had now become an absolute sale of the property; and yet Bell continued in the quiet enjoyment of the goods until he was disturbed by the execution of Voorhis nearly nine months after the mortgage had become forfeited. This possession was inconsistent with the deed, and in such cases there never has been much room for question that the transaction was void as against creditors, and that the fraud was a question of law for the court, and not of fact for the jury. (*Sturtevant v. Ballard*, 9 *John. R.* 337.) In *Divver v. McLaughlin*, (2 *Wendell*, 596,) the mortgagor continued in possession after a default in payment until the goods were seized by a creditor. In an action by the mortgagee for the taking, the right of the creditor was maintained, and that too as a question of law. The court of C. P. had refused to nonsuit the plaintiff, and for that cause the judgment was reversed. The case was decided before the revised statutes took effect.

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It is worthy of remark, that neither this question, nor the case of *Dirver v. McLaughlin*, which is precisely in point, was even mentioned by the senator who delivered the prevailing opinion in *Smith & Hoe v. Acker*; and it would be strange indeed if any decision should have much force as a precedent upon a point which was never considered by the court.

But our decisions have gone beyond this point, and held the mortgage void before, as well as after the money fell due, if there was no change of possession. They have had reference to the new provision in our statute, which applies alike to mortgages and absolute sales, and in both cases requires an "*immediate*" delivery of the property.

Without again going into questions which have already been sufficiently discussed in the books, a few remarks may be proper, by way of explanation. This court has never denied that there may be many cases where the question of fraud in relation to these conveyances will be one of fact for the jury. There may be a question upon the evidence whether the possession was actually, or only colourably changed—whether the change was continued, or only of a temporary character—whether the goods were of such a nature, or were so situated that there could not be an immediate delivery, and then whether possession was taken within a reasonable time; or, if there was an actual and continued change of possession, whether there was a *bona fide* debt or other good consideration for the transfer. And beyond all this, there may still be a question of good faith; for although the property may be delivered, and a sufficient consideration paid, yet if the real object of the parties was to delay, hinder or defraud creditors, the transaction cannot stand. In cases of a mixed character, such as have been mentioned, the question of fraud, or the facts out of which the inference of fraud may arise, must undoubtedly be submitted to the jury; and it is a great mistake to suppose that this court has ever held the contrary doctrine. But when there is no dispute about facts—when it plainly appears that the possession was not chang-



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ed, and there was no obstacle in the way, other than the interest, convenience or accommodation of the debtor, then it has been held that fraud is an inference of law to be declared by the court; and I see nothing in the reasoning of the court, in the case of *Smith & Hoe v. Acker*, to change the opinion I have heretofore entertained upon that point.

True, the statute declares that the question of *fraudulent intent* shall in certain cases be deemed a question of fact, and not of law. In *Beekman v. Bond*, (19 *Wend.* 444,) an attempt was made to show that this provision had ample scope for operation without touching, and that it did not in fact touch, this point. It is not only enacted that conveyances made with a *fraudulent intent* shall be void, but the legislature has gone further, and singled out and seized upon that common and strong badge of fraud—continued possession in the vendor or mortgagor—and declared, that without an immediate delivery, the transfer “shall be *presumed* to be fraudulent and void.” The law itself makes the inference, and nothing is left for a jury.

I am aware that this is not the whole of the section. It proceeds to declare, that the *presumption* mentioned in the first clause shall be *conclusive evidence* of fraud, unless it shall appear that the sale “was made in good faith and without any intent to defraud.” How is this “good faith” to be made out? Proving a consideration, notoriety, and the like, although very well so far as they go, will not be enough, for the plain reason that the statute requires a change of possession. When that is wanting, the statute is so far from allowing that there can be “*good faith*” towards creditors and purchasers, that it declares the transaction, as to them, “*fraudulent* and void.”

But suppose that on proving a consideration, &c. the evidence of fraud is no longer *conclusive*, the most that can justly be said is, that the last clause of the section has then ceased to have any influence upon the transaction. The first clause is not nullified, and the declaration still remains, that the sale shall be “*presumed* to be fraudulent and void;” and without altering the language of the stat



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ute, there is, I think, no way in which this presumption can be got rid of, so long as the fact out of which it springs—unchanged possession—continues to exist.

It may be quite easy to call this a perversion, or to declare that the statute plainly means something else; but such remarks prove nothing.

As I understand the statute, the moment it appears that the possession was unchanged, the law draws from that fact a *presumption* of fraud; and this presumption becomes *conclusive*, unless *the fact out of which it springs* can be explained. It is not enough to show a good consideration, notoriety, &c. without also explaining the *possession*. And it is no explanation of that, to show that it was convenient for the insolvent debtor to keep his property after he had sold it, or that the vendee was his relative or friend and disposed to do him a kindness. The statute has made no such exception, and those who make it are more benevolent than the law of the land.

It may be remarked here, that this court has never decided, as seems to have been supposed in *Smith & Hoe v. Acker*, that "evidence of the change of possession being impracticable, is the only evidence of good faith required by the statute;" and having never said any thing of the kind, the court cannot be responsible for the absurdities and inconsistencies which would have followed, had they fallen into such a blunder. It has undoubtedly been held, that whatever else may appear, the fact of unchanged possession must be explained; but it has never been intimated that the satisfactory explanation of that fact—as by showing an immediate delivery impracticable—would alone be sufficient. Beyond all doubt, a vendee who leaves the goods with the debtor, must not only show a good reason for doing so, but he must make it appear that there was a sufficient consideration and good faith in the whole matter.

If we have not mistaken the true import of the statute, it is not very important to inquire whether the rule it gives be a salutary one or not; and I will not, therefore, stop to vindicate the remarks which fell from me on this subject.

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ject in *Randall v. Cook*. Although those remarks have on several occasions been made the text for some very spirited and witty comments, I am quite content to leave both text and comment to go for whatever others may think them fairly worth.

The suggestion that it may be best for creditors that the mortgagor should be suffered to remain in possession, because he will thus be enabled to make money and pay his debts, is objectionable in every point of view. Who has ever heard of a debtor who either bettered his condition or paid his creditors, after he had got to the point of covering up his goods by a mortgage or bill of sale? The thing may sound well enough in theory, but it will prove wholly fallacious in practice. But the conclusive answer to the argument is, that creditors whose debts are due have the right to judge for themselves whether they will grant indulgence, or resort to legal process for the recovery of their debts; and the law declares, that all conveyances made to *delay, hinder* or defraud them, shall be utterly void.

If after thirty years of legislation for their relief, our laws are not yet sufficiently favorable to debtors, let us proceed by open and direct means to grant them further privileges. If enough of their property has not already been exempted from the reach of legal process, let the exemption be extended; but wherever it ends, let the creditor have efficient means for reaching the residue. Do not let us hold out the hope of legal redress when it is so likely to prove delusive that prudent men dare not venture upon the experiment of seeking it. If it be not enough to exempt particular kinds of property from execution, let us have general "stop laws." I certainly would not be understood as approving of any such questionable expedient. But if debtors must have "relief" in some form, it is better that it should be brought about by direct legislation, than by warping existing laws to the exigency of the times.

Owing to the peculiar circumstances of the times, the recent struggle to uphold chattel mortgages and bills of sale

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without a change of possession, has been a severe one. The fortunes of many men had suddenly fallen into ruin by the failure of the hazardous speculations in which they had embarked; and in their fall they had carried along friends who were chargeable with no other imprudence than that of having loaned their names to those who were in haste to become rich. Some had suffered by the negligent, and some by the fraudulent conduct of those who had been entrusted with the care or management of their property; while others had been overwhelmed by the general derangement of business, and the alarm which prevailed through the whole commercial world when an overstrained system of credits so unexpectedly gave way. The man who had lived in affluence, and the man who fancied he had inexhaustible stores of wealth almost within his reach, had, in some respects, shared a common fate. The riches of the one had taken wings, and the gilded phantoms of the other had suddenly disappeared. Neither could descend at once to the level of his new condition and prospects. When creditors began to press, some made voluntary transfers of their goods to friendly assignees, who left the property where they found it under the pretence that the debtor could best wind up his own affairs. Others executed mortgages and bills of sale of their household furniture and other personal effects, to friendly creditors who would consent to stand between the property and the expected execution. In the meantime no body was paid. Creditors who resorted to legal process were not paid, because an assignment stood in their way. The assignee was not paid, because he did not take the property. He took nothing but a nominal paper lien, and when the property had been dissipated, his debt remained in as full force as though nothing had happened. In short, these transfers answered the precise end which they were designed to accomplish. They left the debtor to eat, to drink, to wear, and to squander his effects, while the creditors from whom the property was obtained, if they were not actually suffering from want, were at the least delayed, hindered and defrauded

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of their rights. Although the circumstances of many debtors and the condition of their families were such as to appeal with great force to the sympathies of all, still the courts were bound to see that the stream of justice flowed onward in its accustomed channel. If judges had the wish, they had not the power to bend the law to hard cases, and all such transfers as those to which I have alluded were declared fraudulent and void.

After the question had been settled by the two highest courts of original jurisdiction in the state, an appeal was taken from a decision of the chancellor, and the case of *Stoddard v. Butler*, (20 *Wendell*, 507,) was brought before the court for the correction of errors. The decree was affirmed, though by an equally divided vote. Debtors and their sympathizing friends then turned to the legislature for relief, and a bill was soon after brought in to legalize mortgages of personal property without a change of possession. I was glad to see that movement; not because I thought the measure a good one, but because, if the law was to be altered, I wished to see the change made by legislation, and not by judicial decision. Statutes are usually made to operate prospectively, and do not disturb rights already acquired. But when the law is changed by judicial decision—especially on a question of such widely extended influence as that relating to conveyances of personal property among a commercial people—it is impossible to foresee all the evil consequences which may follow. Such decisions act upon the past, as well as the future; and no man can feel secure in a community where that which is settled law to-day, may be overthrown to-morrow—in a mode which has an *ex post facto* operation, and thus either legalizes acts which were originally void, or makes those things vicious which were faultless when they happened. To say nothing of personal security, there can be no stable title to property where great and sudden changes in the law are brought about without the intervention of the law-making power.

Changes in the forms and modes in which judicial pro-

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ceedings are conducted, may sometimes be made by the courts, in a way which will do harm to no one. And in relation to questions affecting the title to property, I do not intend to say that there can be no improvement in jurisprudence without the intervention of the legislature. Judges, like other men, will feel the influence of the world around them, and the law cannot remain absolutely stationary while other sciences are advancing. The impulse which carries forward the work of civilization—which opens and enlarges the mind, and improves the social condition of man—cannot fail to reach the halls of justice; and many of those rugged features in the law, which are no longer suited to the condition of the people, will gradually disappear, and give place to doctrines and maxims better adapted to the advanced state of society. The common law is not so inflexible as a statute. It embodies maxims which provide, in some degree, for its own improvement, and give the assurance that its leading principles cannot fall very far behind the spirit of the age. But these changes must be wrought out by such slow and imperceptible degrees that no one can mark the precise period when the transition happened. They must not be so sudden that any man can say he has lost his house, his lands, or his goods. When there is any deformity in the law which cannot await this slow process of amendment, it is for the legislature, and not the courts, to apply the remedy. Legislation leaves men secure in the rights which they already possess, and only establishes new modes of acquiring and losing rights for the future.

The bill before the assembly for altering the law and legalizing mortgages of personal property without a change of possession, was debated very much at large at different periods of the session of 1839. At the first, a considerable majority of the house seemed disposed to pass the bill. But the more the matter was discussed, the more the policy of the measure was doubted. The original majority in favor of the project soon began to dwindle, and before the session closed, the bill was lost—a majority voting against it.

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I have omitted to mention that this subject was also before the legislature in several forms in the preceding session of 1838, when a bill was before the assembly to legalize mortgages without a change of possession; but the project seems not to have found favor with the house. Some account of these movements, though an imperfect one, may be seen in the Assembly journals of 1838 and 1839.

Thus terminated, as I had supposed, the agitation of this question, unless it should again be brought before the legislature. Certainly no one could anticipate that a question which had passed through all the courts of the state with a uniform result, and upon which one branch of the legislature had twice deliberately refused to interfere, was again to be brought forward as a proper subject for judicial discussion.

The case of *Smith & Hoe v. Acker* was not discussed at the bar by counsel, but was submitted on written arguments, in which particular it is like the case of *Root v. Stuyvesant*, (18 *Wendell*, 257,) which has been virtually overruled on several occasions by the same court which pronounced the judgment. Whether it happened in *Smith & Hoe v. Acker*, as it has, I believe, happened in other cases, that the counsel were all employed by the same party, I am unable to say; but I find in the printed brief on the part of the defendant in error, admissions which would not be very likely to come from counsel whose client was deeply interested to uphold the judgment which was reversed. I notice also that some of the arguments which might very well have been pressed upon the consideration of the court, were either very lightly touched, or entirely overlooked. I mention these things, because the weight of a judicial decision may depend in a considerable degree upon the aid which the court received from the discussions at the bar. No man can feel entirely sure in his conclusions until the subject has been viewed in all its various aspects.

Although the case of *Smith & Hoe v. Acker* plainly departs from the law as it had been previously settled, it has

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been strongly urged that, as the decision of a court of *last resort*, it is a conclusive precedent which must be followed until the legislature shall change it. (*See per Colden, senator, in Mackie v. Cairns*, 5 Cowen, 567, 9.) It is undoubtedly true, that the other courts of Westminster Hall have generally considered themselves bound by the decision of the house of lords, though more than one instance might be mentioned where that doctrine did not prevail.<sup>(a)</sup> But it may be remarked in relation to the house of lords, when sitting as a court of review, that it not only abides by its own judgments, but considers itself bound by the law as it has been settled by other courts, whatever may be its own notions of the matter as an original question. No case can, I think, be found, where any member of that court has started with an avowal that his "vote would directly conflict with the whole course of decisions" of any other court upon the question to be reviewed. When there has been a uniform "course of decisions" in England on a statute or any other branch of the law—especially in cases where those decisions affect the title to property—the house of lords, however erroneous those decisions may be deemed, does not feel itself competent to apply a remedy without the concurrence of the house of commons.

It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent. It is an elementary principle, that an erroneous decision is not bad

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(a) The reversal by the house of lords, of Lord Somers' decree, in *Kettle v. Townsend*, (1 Salk. 187,) is one instance. Sir John Trevor, M. R. denied the authority of that decision, affirming moreover, that if the same case were to come again into the house of lords, they would decide differently. (*Watts v. Bullas*, 1 P. Wms, 60, 1.) Lord Harcourt seems also to have refused to follow it as a precedent. (*Id.* p. 61, note.) Of the same case, Lord Loughborough spoke as follows: "I have no difficulty in saying, I think of that determination of the house of lords as Lord Harcourt and other judges have done." Adding: "Upon the journals of the house of lords, it appears no one was present upon that reversal who could know much of the matter; it was not determined by lawyers: and Lord Harcourt speaks of it certainly as not such a decision as he would follow: and one or two other judges have not treated it with much respect." (*Hills v. Downton*, 5 Ves. 565.)

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law—it is no law at all. It may be final upon the parties then before the court, but it does not conclude other parties having rights depending on the same question.

I will refer to a few cases, for the purpose of showing that our court for the correction of errors does not abide by its own decisions. The case of *Murray v. Riggs*, (15 *John. Rep.* 571,) was very much shaken, if not completely overturned, by the case of *Mackie v. Cairns*, (5 *Cowen*, 547.) *Forgey v. Sutliff*, (7 *Cowen*, 713,) was virtually overruled by *Priest v. Cummings*, (20 *Wendell*, 338.) The case of *Livingston v. The Peru Iron Company*, (9 *Wendell*, 511,) so far as it stands on the reasons assigned for the judgment, was wholly disregarded in *Humbert v. Trinity Church*, (Dec. 1840.) (b) In *Root v. Stuyvesant*, (18 *Wendell*, 257,) it was held that a will, void in part, though only to a very limited extent, was void *in toto*. This case has been repeatedly overruled. (*Hone v. Van Schaick*, 20 *Wendell*, 564. *Kane and wife v. Gott*, [Dec. 1840.]) (c) And see *Darling v. Rogers*, (22 *Wendell*, 483.) These examples are sufficient to show, that our court of *dernier resort* does not regard its own decisions as conclusive by way of precedent: and if not so regarded by that court, it would be strange indeed if other courts were bound to follow them at all events, and without looking into the reason on which they stand.

There is a further reason why the decisions of the court for the correction of errors should not be implicitly followed. It is well known that some of the members of the court do not consider themselves tied down to what are sometimes called the strict and technical rules of law, but feel at liberty to decide according to their own sense of what is right in the particular case under consideration, without much regard to legal precedents. That this sentiment has not often found its way into reported cases, may be accounted for by the fact that it is more commonly adopted

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(b) 24 *Wendell*, 587.(c) 24 *Wendell*, 641.



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by those members of the court who are not in the habit of preparing written opinions, than by others. And besides, cases in which such opinions have been expressed—to say nothing of those in which such opinions have been acted upon in silence—would be less likely to be reported than others, for the reason that lawyers—to which fraternity reporters usually belong—are in the habit of adhering with much zeal to legal precedents.

But we shall be able to find a trace of this doctrine in the books. There are several reported cases where its influence might be discovered on a close scrutiny; but it will be sufficient to mention one or two, where the sentiment is quite apparent. In *Smith & Hoe v. Acker*, which has so often been mentioned, the learned senator who delivered the prevailing opinion very frankly avowed that his vote would “directly conflict”—not simply with the judgment of this court in the particular case then under review, or with any other single judgment of a recent date, but—“with *the whole course* of the decisions of the supreme court upon the principal question.” He added, that the question seemed a very simple one “to a mind not embarrassed by the decisions.” And after having thus thrown off the shackles of legal authority, he proceeded to assign the reasons for his judgment.

In *Lovett v. Pell*, (22 *Wendell*, 369,) it was held that a misjoinder of counts in the declaration was not a sufficient ground for reversing a judgment; although the precise question had been decided the other way twenty years before in *Cooper v. Bissell*, (16 *John. Rep.* 146,) and although there never had been any conflicting decisions upon the question. It is true, that the learned senator who delivered the prevailing opinion, seemed to lay some stress upon the word *mispleading* in our present statute of amendments; but as that word had been in the statute of jeofails for three hundred years—(it will be found in 32 *Hen. VIII. c.* 30)—we cannot for a moment suppose that the decision turned on the notion that this was a new provision in the law. The court evidently thought itself at liberty to lay

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down what was deemed a more wholesome rule than that which prevailed in *Cooper v. Bissell*, although that case had not only stood unimpeached long enough to give it sanction as a precedent, but was at the time nothing more than declaring over again a point which had been settled a hundred and fifty years before, as abundantly appears by the cases referred to in the opinion of the chancellor. Here then is a case where the court, plainly and beyond all room for question, acted upon the principle that it was not tied down by adjudged cases, but was at liberty to follow its own sense of what was right between the litigant parties.

The court not only acted upon this doctrine, but it was I think, plainly avowed by the learned senator who delivered the prevailing opinion. He not only remarked, that the supreme court had followed a "rigid technical rule," which means, I presume, that it had decided according to law, but he proceeded in the plainest terms to admit, that the judgment which he proposed to reverse was in accordance with legal precedents both here and in England. It is then intimated, and subsequently repeated in the course of the opinion, that the question was open for review, because it had not been previously adjudged by the court for the correction of errors.

In *Warner v. Beers* and *Bolander v. Stevens*, [April, 1840,] (d) the same learned senator again touched upon this doctrine. After stating the inquiry, whether certain associations fell within "the policy and intent" of a particular restriction in the constitution, he proceeds to answer, that "if this were indeed the case, a court like this, organized expressly to qualify and regulate the decisions of inferior tribunals, (which must of necessity be governed by precedent and authority,) by infusing into the law a larger spirit of equity and general principle—such a court might well deem it their duty to disregard the rigid legal interpretation

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of the language of the constitution, and to look only to its intent and ultimate object." How far it was intended to go by way of affirming the power of the court for the correction of errors over the constitution, I will not venture to say; but, at the least, the language seems fairly to imply that that court is not, like inferior tribunals, necessarily governed "by precedent and authority," which is equivalent to saying, the court is not bound by the law of the land.

Without pursuing the subject further, it must be apparent that some of the members of the court of the last resort claim for that high tribunal a much larger license in disposing of the questions brought before it than is exercised by other courts. Whether this be right or wrong, is a question upon which at this time I shall say nothing. I merely state the fact for the purpose of drawing the very obvious conclusion, that the decisions of that court, although final as between the parties litigant, are so far from being conclusive by way of authority, that they are entitled to much less weight than the judgments of those courts which consider themselves bound by legal adjudications. This must be so in all cases. But where, as in *Smith & Hoe v. Acker*, the court has professedly departed from "*the whole course of decisions*," the judgment is entitled to no weight at all.

I cannot concur with my brethren in following a decision which we all agree is repugnant both to the statute and the common law.

There was no sufficient proof of a consideration for the mortgage from Davids to the plaintiffs; but as the judge did not put his decision upon that ground, I have considered the case as though a good consideration had been shown.

New trial granted.

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Prentiss v. Slack.

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**PRENTISS vs. SLACK and another.**

Where a bill of sale, proved to have been given for a true debt, was assailed as fraudulent in respect to the vendor's creditors, and there was some evidence of an immediate and continued change of possession of *part* of the property embraced in it: *Held*, that the judge did right in submitting the question of fraud to the jury, and their verdict sustaining the sale could not be disturbed.

Since the case of *Smith & Hoe v. Acker*, (23 *Wend.* 653,) the jury may allow almost any excuse for continuance of possession in the vendor or mortgagor, and the court have no power to set aside the verdict because of the excuse being insufficient.

REPLEVIN, by Prentiss against Slack and Jones, tried at the Albany circuit, in June, 1839, before CUSHMAN, C. Judge. On the trial, the plaintiff's title was by a bill of sale executed to him by one Froment. There was evidence tending to show that the bill of sale was made in consideration of a debt due from Froment to Prentiss; that an agent of the latter took possession of the greater part of the property in question in a day or two after the giving of the bill of sale, and had continued so to possess since. Whether this change was *bona fide*, or only colorable, was at least doubtful upon the evidence. The possession of the remainder, consisting of a wagon and horses, did not appear to have been changed at all. The defendants were judgment creditors of Froment, and caused the property to be levied on and taken by virtue of executions against him; and for this, the action was brought. They contended that the sale by Froment to the plaintiff was fraudulent as to Froment's creditors. The circuit judge however refused to nonsuit, and left the question of fraud to the jury. A verdict having been found for the plaintiff, the defendants now move for a new trial on a case.

*H. G. Wheaton*, for defendants.

*S. Stevens*, for the plaintiff.

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*By the Court, COWEN, J.* In this case the question arises upon a bill of sale from one Froment to the plaintiff, under which he claims against a levy of Froment's creditors. The jury found for the plaintiff. It is insisted by the defendant's counsel, that there never was a *bona fide* change of possession. But there was some evidence of a change as to most of the property; and that it continued. The jury have found that the sale was *bona fide*; and independently of the question whether the possession was changed or not, their verdict is conclusive. The jury may allow almost any excuse for the vendor continuing in possession; and we have no right, since *Smith & Hoe v. Acker*, (23 *Wend.* 653,) decided by the court of errors, to say that it is insufficient any more on a bill of sale than on a mortgage. Nor is it any objection that an absolute bill of sale has not been filed pursuant to the act of *April 29th*, 1833, (*Sess. Laws of 1833*, p. 492;) that act applying to mortgages only. I have already considered the question now before us, in *Eutler & Barker v. Van Wyck*, (*ante*, p. 438,) which arose upon a deposited mortgage. The question is the same on an absolute bill of sale. This I remarked in that case; and added, that *Smith & Hoe v. Acker* must accordingly be regarded as applying to bills of sale as well as mortgages.

My opinion is that a new trial should be denied.

Ordered accordingly.

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The People v. Jenkins.

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## THE PEOPLE vs. JENKINS.

The act of April 15th, 1839, (*Sess.* 1839, p. 147, § 1,) regulating the speed of steam boats while passing, coming to, or going from the wharves of the city of Albany, is not repugnant to the constitution, or any law which congress has passed under its power "to regulate commerce," &c.

DEBT, to recover a penalty of \$200, tried before CUSHMAN, C. Judge, at the Albany circuit, in December, 1839. The act of April 15th, 1839, provides that no steamboat navigating the Hudson river, "shall proceed or be propelled with greater speed than at the rate of four miles an hour while passing the wharves of the city of Albany, or while coming to or departing therefrom." (*Stat.* 1839, p. 147, § 1.) The second section gives a forfeiture for violating the above provision of \$200, against the master or any person having the charge or command of the boat, to be sued for in the name of the people, by the district attorney of the county. The Hudson, at Albany, is a navigable river, in which the tide ebbs and flows. Albany is a port of entry, and the office of the deputy collector is higher up the river than the point at which the boat was, at the time she was passing the wharves at a greater speed than that mentioned in the statute. The defendant was the master of the boat at the time. The judge decided that the act was constitutional, and the jury found a verdict for the people.

*M. T. Reynolds*, for the defendant, insisted that the statute was unconstitutional. He cited *Corfield v. Coryell*, (4 *Wash. C. C. R.* 371;) *Gibbons v. Ogden*, (9 *Wheat.* 1;) *Brown v. State of Maryland*, (12 *id.* 419;) *Steamboat Co. v. Livingston*, (3 *Crown*, 713;) *Wilson v. Blackbird Creek Co.* (2 *Peters*, 245.)

*R. W. Peckham*, (district attorney,) for the people, also cited the case in 2 *Peters*, 245; and added, *City of N.*

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The People v. Roe.

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*Y. v. Miln*, (11 *Peters*, 102 :) *The People v. The Rensselaer & Saratoga R. R. Co.* (15 *Wendell*, 113.)

*By the Court*, BRONSON, J. I can see nothing in the cases referred to by the defendant's counsel tending to show, that the statute in question is repugnant either to the constitution of the United States, or to any law which congress has passed under its power "to regulate commerce with foreign nations and among the several states ;" and the cases mentioned by the district attorney abundantly establish the validity of the enactment. Steamboats, when passing the wharves of the city, cannot continue their usually rapid movement without endangering the lives and the property of individuals. This police regulation was made to guard against such consequences; and it neither injures the navigation of the river, nor conflicts with any regulation of commerce by the general government.

New trial denied.

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### THE PEOPLE vs. ROE.

On a demurrer to evidence, every conclusion which the jury would have been warranted in drawing from the testimony given, must be considered as admitted by the party demurring.

Where the defendant was prosecuted for a penalty under the act of April 15th, 1830, regulating the speed of steamboats in passing the wharves at Albany; and, for the purpose of identifying him as the person in charge of the boat at the time, a witness swore that the defendant was captain of her during that season, and also on the day upon which the alleged offence was committed, but he did not know whether the defendant was on board when she passed the wharf as charged: *Held*, on demurrer to the evidence, that it was sufficient to warrant judgment for the prosecution.

THIS was an action to recover a penalty under the statute mentioned in *The People v. Jenkins*, (*ante*, p. 469.) The action was tried at the Albany circuit, in December, 1839, before CUSHMAN, C. Judge. A witness proved that the

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The People v. Roe.

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steam boat *De Witt Clinton* passed the wharves at Albany on a specified day at a greater speed than that mentioned in the act. He said the defendant was the captain of the boat during that season, and was the captain of her on the day in question ; but he did not know whether the defendant was on board at the time or not. The defendant demurred to the evidence.

*M. T. Reynolds*, for the defendant, said there was not sufficient evidence to charge the defendant.

*R. W. Peckham*, (district attorney,) for the people.

*By the Court*, BRONSON, J. On this demurrer, every conclusion which the jury would have been warranted in drawing from the evidence must be considered as admitted ; and if the cause had not been withdrawn from the jury, and they had found a verdict for the people, we certainly should not have set it aside. Proof that the defendant was the master of the boat, not only during the season, but on the particular day—especially in the absence of any rebutting evidence—was sufficient to carry the cause to the jury ; and that is enough.

Judgment for the people.(a)

(a) For the form of a demurrer to evidence, and joinder therein, see *Burrill's Pr.* 91 to 93 ; *Tillingh. Forms*, 181. And as to the practice, at the trial and afterwards, see *Grah. Prac.* 308, 9, 2d ed. ; *Rules of Sup. Ct.* (revision of 1837,) Nos 38, 39, 79 ; *Trials Per Pais*, 560 et seq. ; *Anth. N. P.* 79, note (a).

The true and proper office of a demurrer to evidence is, to refer to the court the law arising upon the facts. Regularly, therefore, where there is testimony in the case of a doubtful, conflicting or circumstantial nature, every fact and conclusion which it tends to establish as against the party demurring, must be distinctly admitted by him before the other party can be compelled to join in demurrer. (*Gibson v. Johnson*, 2 H. Bl. 187. *Wright v. Pindar*, Alleyn, 18. *Anth. N. P.* 79, 80, note (a). *Per Story, J.* in *Fowle v. The Common Council of Alexandria*, 11 Wheat. 320, 321. *Young v. Foster*, 7 Porter, 420. *Curry v. The Bank of Mobile*, 8 id. 360. See also *Young v. Black*, 7 Cranch, 565, 568. *Maus' lessee v. Montgomery*, 11 Serg. & Rawle, 329. *Duerhagen v. The United States Ins. Co*



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2 *id.* 187.) Indeed, the cause made by a demurrer to evidence is in many respects like a special verdict; which must state facts, and not the mere evidence of them. It should admit whatever the jury might reasonably infer from the evidence. (*Fowle v. The Common Council of Alexandria, supra.*) And if a party will in this way take the question from the jury, the court will not be scrupulously nice in adjusting the balance of the evidence, but quite liberal in their inferences from the testimony as against such party. (*Bank of the United States v. Smith*, 11 *Wheat.* 171. *McGehee v. Greer*, 7 *Porter's Rep.* 537, 540. *Patrick v. Hallett*, 1 *John. Rep.* 241.) It is true, forced and violent inferences should not be allowed; (*Pawling v. The United States*, 4 *Cranch*, 219, 222; *Hansborough's ex'rs v. Thom*, 3 *Leigh's Rep.* 147; *Stephens v. White*, 2 *Wash. Rep.* 203, 210;) but any inference which the jury might with the least degree of propriety draw from the evidence, is to be conceded. (*Dickey v. Schreider*, 3 *Serg. & Rawle*, 413, 416.) The evidence being loose and uncertain, the party offering it may state what he wishes to have admitted, and the demurrant should then admit all that the evidence conduces to establish, before the other side is compelled to join in demurrer. (*Duerhagen v. The United States Ins. Co.* 2 *Serg. & Rawle*, 185, 187.) If one fact tends to the induction of another, the last fact should be also expressly conceded. (*Id. per Tilghman, C. J.*)

But where the party against whom the demurrer is interposed joins therein, without insisting on these admissions as a preliminary, the court will proceed and draw the same inferences against the demurrant which the jury might have drawn; and if upon any view of the facts the jury might have rendered a verdict against him, the court will give judgment accordingly. (*Thornton v. The Bank of Washington*, 3 *Peters' Rep.* 36. *Chinoweth et al. v. Haskell's lessee*, 11 *id.* 92. *Columbian Ins. Co. v. Catlett*, 12 *Wheat.* 383, 389. *United States Bank v. Smith*, 11 *id.* 171, 179. *Patrick v. Ludlow*, 3 *John. Cas.* 10, 14, 15. *Forbes v. Church*, *id.* 159, 160. *Lewis v. Few*, 5 *John. Rep.* 1, 34. *Ross' lessee v. Eason*, 4 *Yeates' Rep.* 54. *Steinbach v. Columbian Ins. Co.*, 2 *Caines' Rep.* 129, 134. *Smith v. Steinbach*, 2 *Caines' Cas. in Err.* 158, 171. *Wheelwright v. Moore*, 1 *Hall's R.* 207. *Lowry v. Mountjoy*, 6 *Call's Rep.* 55. *Snowden v. Phoenix Ins. Co.*, 3 *Binn. Rep.* 457. *Pawling v. The United States*, 4 *Cranch*, 219. *McGehee v. Greer*, 7 *Porter's Rep.* 537.) Though held, in *Fowle v. The Common Council of Alexandria*, (11 *Wheat.* 320, 323,) that if there be a joinder without such admissions, leaving the facts loose and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer, and for awarding a new trial. (See also *Gibson v. Johnson*, 2 *H. Bl.* 187, 209; *Wheelwright v. Moore*, 1 *Hall's Rep.* 201; *Per Omond, J. in Lea v. Branch Bank of Mobile*, 8 *Porter's Rep.* 119, 123; *Gazzam, &c. v. Bank of Mobile*, 1 *Alab. Rep.* 268, new series.)

The better opinion seems to be, that a bill of exceptions will not lie for the court's refusing to compel a party to join in demurrer: it being matter resting mainly in discretion. (See *Young v. Black*, 7 *Cranch*, 565. But see *Anth. N. P.* 79, note (a).)

In this state, a demurrer to evidence is a proceeding inapplicable to a justice's court. (*Reynolds v. Redford*, 3 *Caines' Rep.* 140.)

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Fuller v. Acker.

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FULLER vs. ACKER.

After default in payment of a chattel mortgage, the mortgagee's title to the property becomes absolute at law, and he is entitled to the possession immediately. Hence, he may maintain replevin in the *cepi* against one who tortiously takes it from the mortgagor.

Nor can it vary the case though, subsequent to the default, the mortgagee filed a copy of the mortgage and a statement, pursuant to the act of April 29th, 1833 for that will not operate an extension of credit, or give the mortgagor any additional right of possession.

Though it be proved that the mortgagor of a chattel continued in possession, yet if the mortgage was given to secure a true debt, and the jury have negatived the allegation that it was made to defraud creditors, &c. this court cannot set aside their verdict as against the weight of evidence.

A mortgage dated in 1837, appointing a day in 1830 for payment, is in legal effect payable immediately; and, as between the parties, oral evidence is inadmissible to vary its operation.

Otherwise, as between the mortgagee and a judgment creditor assailing the mortgage as fraudulent. The former, for the purpose of repelling the fraud, may show the day of payment intended, and that the error occurred through inadvertence or mistake of the draftsman.

REPLEVIN, tried at the New-York circuit, March 23d, 1841, before GRIDLEY, C. Judge. The action was brought for wrongfully taking, &c. certain household furniture, to which the plaintiff claimed title under a mortgage to him from William Wagstaff. The mortgage was dated March 11th, 1837, and purported to have been given to secure the payment of a debt of \$872,66, by "the tenth day of *March, one thousand eight hundred and thirty.*" The original was filed on the day of its date, and copies filed with statements for three successive years afterward. The mortgage contained the usual provision, that the mortgagee might sell in default of payment, &c.

The defendant, who was sheriff of the county of New-York, having on the 11th of May, 1838, received a *fi. fa.* against Wagstaff, seized the property in question by virtue thereof on some day afterward and previous to the first Monday in June succeeding; from whom the plaintiff took it by his writ of replevin. It appeared that the *fi*

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Fuller v. Acker.

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*fa.* was duly issued on a valid judgment, and that the property was seized by the sheriff while in Wagstaff's possession.

The only witness called by the plaintiff on the trial was Wagstaff, the mortgagor. He testified, that *the mortgage was given for a loan made to him by the mortgagee*, on the day of its date; that the loan was for the exact amount named in the mortgage; that a part of the loan had been since paid, and the amount remaining due was \$400; that when he gave the mortgage, he believed himself worth \$120,000, but had no unincumbered property except what was included in the mortgage; that the mortgagee resided at Skaneateles; that the property mortgaged was worth, in his (Wagstaff's) opinion, considerably less than the amount of the sum loaned; *that he (Wagstaff) had always remained in possession of the property, using it in his family*, until within a year past; that he communicated the fact of the levy to the mortgagee soon after it was made, and told the sheriff of the mortgage when he levied, &c.

This witness was allowed to testify, that, in drawing the mortgage, an error was committed in respect to the time of payment; that the time agreed upon and intended was, *March 10th*, 1838, and that the word "eight" was inadvertently omitted. To the ruling of the circuit judge admitting this evidence, the defendant's counsel excepted.

The above facts appearing, the plaintiff rested; whereupon the defendant's counsel moved for a nonsuit, on the ground: 1. That the form of action, being in the *cepit*, was wrong; 2. That the mortgage was fraudulent as against the mortgagor's creditors; 3. That the filing of copies of the mortgage with a statement pursuant to the act of *April 29th*, 1833, operated as an extension of the time of payment, thus giving Wagstaff the right of possession; and, therefore, the sheriff was not a trespasser. The motion was overruled, and the defendant again excepted.

The circuit judge submitted the question of fraud to the jury, who found for the plaintiff; and the defendant now moved for a new trial upon a bill of exceptions.

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Fuller v. Acker.

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*N. B. Blunt*, for the defendant.

*A. Benedict*, for the plaintiff.

*By the Court*, COWEN, J. By the mortgage and default in payment, the plaintiff became absolute owner at law, however he might be viewed in equity. He was entitled to take possession at any time from the mortgagor, who then became a mere naked bailee. Nor did the filing of a copy of the mortgage and a statement, pursuant to the act of *April 29th*, 1833, admitting that it took place anterior to the seizure, work an extension of credit. The object in such cases is to hold the property as against creditors under the original stipulations in the mortgage, and for this purpose alone is it required by the statute. There is nothing in it at all incompatible with insisting on immediate payment, or the effect of the forfeiture.

The mortgage was clearly fraudulent within the repeated decisions of this court; and under our own rule, and perhaps the rule of England, and every state in the union except this, it would be our duty to pronounce it so, and order a new trial as against the weight of evidence. There was, however, some evidence of a good consideration; and since the decision of the court for the correction of errors in *Smith & Hoe v. Acker*, (23 *Wend.* 653,) we have held, and must continue to hold, that the jury have a right, in their discretion, to excuse possession in the mortgagor; and that we cannot interfere, as we may do when they decide against the weight of evidence on a question of fact in other cases.

It is also insisted, that the learned judge erred in allowing oral evidence to show the time when the parties intended that the mortgage should be payable. An impossible time for payment was mentioned—1830, in a mortgage dated in 1837. This, in legal effect, was the same as if no time had been specified, and the money was therefore payable immediately. (*Thompson v. Ketcham*, 8 *John. R.* 189.) You can no more contradict the legal ef

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fect of a written contract by oral evidence, than its express provisions. As between the parties to the mortgage, therefore, the oral evidence would not have been admissible. This was held in *Thompson v. Ketcham*. But that is not quite so clear as between the mortgagee and the sheriff, on the question of fraud. That the parties intended the debt should be payable immediately, would have added color to the fraudulent intent inferrible from a want of change in the possession. This was in a degree repelled, (though, I admit, it was a small circumstance,) by showing the mistake of the draftsman. On questions of fraud like this, which is *inter alios*, the objection of an estoppel does not apply, as it would if the litigation were between the immediate parties.(a)

On the whole, therefore, I am of opinion that the motion for a new trial should be denied.

New trial denied.

(a) See *Johns v. Church*, (12 Pick. 557, 560, 1 ;) *Henderson v. Dodd*, (1 Bail. Eq. Rep. (So. Car.) 138, 9, per Roane, J. ;) *Champion v. Butler*, (18 John. R. 169 ;) *Tripp v. Hathaway*, (15 Pick 47.)

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BURGESS vs. ABBOTT and ELY.

When a declaration shows on its face that there is another person who, if living, ought to be joined as defendant, but does not allege expressly whether he is alive or not, the non-joinder cannot be taken advantage of by demurrer, but only by *plea in abatement*.

Otherwise, if it be alleged in the declaration that the person is still living.

The rule on this subject is the same, whether the action be founded in contract or on the judgment of a court of record.

In pleading abateable matter, great fulness is required, and the pleader must leave nothing to intendment.

*Seemle*, if a declaration shows there are others who should be made *plaintiffs*, but is silent as to whether they are alive, the defendant may avail himself of the non-joinder by demurrer.

ERROR from the superior court of the city of New-York. The action below was debt, brought by Abbott and Ely against Burgess. The declaration was on a judgment of

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the superior court of Cincinnati, Ohio, rendered against Burgess and one Henry Crane; but it did not expressly show whether Crane, at the time of commencing the present suit, was living or not. The defendant demurred generally, and the plaintiffs joined in demurrer. Judgment having been rendered for the plaintiffs in the court below, the defendant sued out a writ of error.

*W. Watson*, for plaintiff in error.

*C. Judson*, for defendants in error.

*By the Court*, COWEN, J. It is treated by the books as clear, that when a declaration or other pleading of the plaintiff, in an action against one upon a contract, shews that he is a joint contractor with another not sued, saying moreover, in express terms, that *the contractor not sued is still living*, the defendant shall not be put to his plea in abatement; but may demur, or move in arrest, or maintain error, in case of a verdict against him. (1 *Chit. Pl.* 46, *Am. ed.* of 1840, *and the cases there cited.*) If it do not thus appear in terms that the party omitted is still alive, the question seems to be open whether the non-joinder must not be pleaded in abatement. A case in the Year Book, (28 *H.* 6. 3, *a*, *pl.* 11,) and *Cubell v. Vaughan*, (1 *Saund.* 291, 1 *Ventr.* 34, *S. C.*, 1 *Sid.* 420, *S. C. nom. Chappel v. Vaughan*,) are strong cases that it must. (*Vid.* 1 *Saund.* 291, *a*, *note* 2.) These cases are considered in 1 *Saund.* 291, *b*, *note* (4), and several subsequent cases cited; and some being of an equivocal character in the report are sought to be reconciled. The learned annotator, himself a very high authority, thinks that the principle governing a plea of non-joinder in abatement, where you must always aver full life, would seem to demand the same averment on the other side, when the objection is founded upon what appears there. The rule is that you need not plead in abatement a matter with which you are already furnished by the plaintiff's own pleadings; (*Eyre. C. J. in Scott v*

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*Godwin*, 1 *Bos. & Pull.* 73;) but in order to satisfy this rule you must be furnished by him with every material fact. If he do not aver life, therefore, it follows that you must aver it by plea; for in availing yourself of mere abateable matters, great fulness is required; and courts will not, in this respect, help pleaders by intendment. Non-joinder of a defendant is no more than abateable matter, in whatever form it may appear; and is considered rather an ungracious objection, as may be seen by *Rice v. Shute*, (5 *Burr.* 2611, 2613.) See the case of *Horner v. Moor*, cited by Aston, J. (*id.* 2614,) which favors the doctrine in the note to *Saunders*.

On the other hand we have been referred to several cases, of non-joinder on the side of the plaintiff. In these it is held fatal if he shew non-joinder simply, even without expressly averring life in the party off the record. But this objection is always received with much less disfavor than a non-joinder of defendants. The plaintiff knows his associates, whereas he is often ignorant of those on the other side. Hence the ordinary intendment is allowed against him. And the difference between the two cases will be found to have been put upon this ground in *Scott v. Godwin*, (1 *Bos. & Pull.* 73, 74,) in a very learned opinion of Eyre, Ch. J. *Addison v. Overend*, 6 *T. R.* 766,) is the strongest, among that class of cases, in favor of the plaintiff in error.

*The King v. Young*, (2 *Anstr.* 448,) held the doctrine contended for by the plaintiff in error more directly. The suit was on a recognizance, and McDonald, Ch. Baron, lays down the rule that if the non-joinder of a defendant appear by the declaration, it is bad, irrespective of any averment of life. But that case went on *Blackwell v. Ashton*, (*Aleyn*, 21,) which qualifies the rule by confining it to *scire facias* on a record and conceding that full life must appear to have been averred in case of a bond. Whether there be any thing in the distinction at this day may be doubted. Lawrence, J. too, in *South v. Tanner*, (2 *Taunt.* 256,) says, when speaking of the point, that "a person sued as living,

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is presumed to continue alive;" but the point decided by that case was different, and the remark was made as a reply to counsel in the course of their argument. A case subsequent to that of *The King v. Young* in the court of exchequer, would seem, however, fully to bear him out; viz. *The King v. Chapman*, (*Anstr.* 811,) which was *scire facias* on an auctioneer's bond. The Lord Chief Baron said, the court could not distinguish it from *The King v. Young*. The counsel, Marryatt, arguendo, spoke of the contrary rule as being a very idle one, saying "It is impossible to believe that the fact of the co-obligor being alive could appear on the face of the declaration."

In *Whitaker v. Young*, (2 *Cowen*, 569,) it seems to have been taken for granted that the declaration shewed life in the heir not sued, who was stated in the declaration as still refusing with the others to pay the debt. The objection that such an averment had been omitted was not made, and the court cite and approve the rule in an old edition of 1 *Chit. Plead.*, put there with the same qualification as in the last. Other American courts have, however, followed the rule of the English exchequer, applying it to the non-joinder of a co-contractor, by bond or simple contract, appearing in the declaration, though not accompanied by the express averment that he is living. (*Leftwich v. Berkeley*, 1 *Hen. & Munf.* 61. *Newell v. Wood*, 1 *Munf.* 1. *Harwood v. Roberts*, 5 *Greenl.* 441.) See also what was said in *Blackwell v. Ashton*, (*Styles*, 50;) also *Osborne v. Crosbern*, (1 *Sid.* 238.)

I have not looked into any other cases. Enough have been cited to show their exceeding conflict; but I am inclined to think that the ancient and true rule in England is the one laid down by Williams in his note to Saunders, already noticed. It is in harmony with the nature of the plea of non-joinder, and with the policy of discouraging dilatory pleas, which seems to have attached directly to abatement for non-joinder of defendants, whether objected on the declaration or interposed by plea, so early as the Year Book of Hen. 6. The present question, it is true,



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arises on a demurrer to the first count of a declaration on a judgment rendered in a court of record of the state of Ohio. But even had it been *scire facias* on a domestic judgment, it is quite difficult to perceive how the question could be varied by that circumstance, notwithstanding the case of *The King v. Young* in the exchequer.

The question is certainly beset with difficulties more pressing than I supposed on the argument; for it was not till after that, I had heard or seen any thing of the decisions in the learned courts of Virginia and Maine.

My principal object has been to inform myself of the English rule as it stood at the time of our revolution; and I am satisfied, though not without some hesitation, that it is in favor of the defendants in error; and therefore that the superior court decided rightly.

Judgment affirmed

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THE RICHMOND TURNPIKE CO. vs. VANDERBILT.

The owner of a steamboat is not responsible in an action on the case, for the wilful misconduct of the master in running her against and injuring another boat.

The tenth section of the statute (1 R. S. 683, 2d ed.) relating to the navigation of certain rivers, &c. by steamboats, only enlarges the owner's liability so as to subject him for certain specified *penalties* incurred by the master; and was not intended to trench further upon the common law rights of the former.

ON error from the superior court of the city of New-York. The action below was case, by Vanderbilt, for a collision of the steamboat "Sampson," belonging to the defendants below, with the steamboat "Wave," owned by Vanderbilt. There was strong reason on the evidence for believing that the master of the "Sampson" perpetrated the injury wilfully. The court below refused to charge that, if wilful, the defendants below were not liable. The latter excepted; and after judgment for the plaintiff below, brought error.

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Richmond Turnpike Company v. Vanderbilt.

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*J. P. Hall*, for plaintiffs in error.

*N. Sherwood*, for defendant in error.

*By the Court*, COWEN, J. Several grounds are taken for reversing the judgment which need not be noticed; for we are clearly of opinion that the court below erred in refusing to charge that if the collision was wilful on the part of the defendants' master, they were not liable. Clearly they were not at the common law, nor under the 2 R. S. 456, § 16, 2d ed., which does not alter the effect of the relation between master and servant. (*Wright v. Wilcox*, 19 *Wendell*, 343.)

It is supposed, however, that the 1 R. S. 681, 2d ed. Tit. 10, concerning navigation, makes the owner liable to a private action, even for the wilful misconduct of the master. The first nine sections of that act prescribe certain rules of conduct in navigating steam boats within our jurisdiction, imposing (§ 9,) penalties on the master for their violation; and then the 10th section declares that "The owners of every steam boat shall be deemed responsible for the good conduct of the masters employed by them; and if any penalty incurred by such master cannot be collected of him in due course of law, the same may be recovered of the owners of the boat, &c. in the same manner as if they were sureties of such master." The penalties are collectable by the district attorney in a suit by the people. The responsibility imposed on the owners by the 10th section, is evidently an enlargement of their liability no farther than to subject them as sureties for any penalties which may be incurred by their master under the previous section. (Vid. also the 12th section for a like provision as to other penalties.)

But if we stop with the first clause of the 10th section, and read it generally as a declaration of *responsibility for the master's good conduct*, we have no more than the common law rule. That too holds the owner thus responsible, and is laid down in about the same words, qualified

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and restricted, however, so as to confine its application to the master's conduct *as master*; not his conduct when he goes without the scope of his authority, by committing a wilful trespass or other wrong. He then, *quoad hoc*, ceases to be the master. The distinction was examined in *Wright v. Wilcox*, and put on the very point of inquiry which has been here disregarded by the court below.

Judgment reversed.

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BESLEY and another vs. PALMER and ROSEVELT, impleaded with L. P. Sanger.

Proceedings by attachment under the statute relating to absconding, concealed, and non-resident debtors, may be instituted by assignees of the demand sought to be collected, in their *own names*; and the bond executed by the debtor and his sureties, on applying for a discharge of the attachment, will be valid though drawn in the same way.

An attachment under that statute does not lie on a judgment rendered by the court of a neighboring state.

Nor will it lie on the original contract debt for which such judgment was recovered. The judgment of a court of a neighboring state is no less effectual in extinguishing the demand on which it was rendered, than the judgment of a court strictly domestic.

DEMURRER to declaration. The action was on a bond given under the statute, (1 R. S. 764, 773, § 55 *et seq.* 2d ed.) relating to attachments against absconding, concealed, and non-resident debtors. The declaration set out the attachment proceedings, showing that the attachment was issued on the petition of the plaintiffs as the attaching creditors, against the property of James Y. Sanger, Lucien P. Sanger, and David Sanger. The declaration further set forth that property had been seized on the attachment; that Lucien P. Sanger, one of the defendants, applied pursuant to § 54 of the statute above referred to, for a discharge of the attachment, and that thereupon the bond in question was executed by said Lucien, with Palmer and Rosevelt, the other de-

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*Bealey v. Palmer.*

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endants, as his sureties. It further appeared from the attachment proceedings as detailed, and from other independent averments in the declaration, that the plaintiff's demand upon which the attachment issued and which was claimed as recoverable on the bond, consisted originally of a joint and several promissory note, executed by the said J. Y., L. P., and D. Sanger, to the plaintiffs; that they (the plaintiffs) caused a suit to be commenced upon the note, against the said J. Y., L. P., and D. Sanger, in a circuit court of the state of Indiana, wherein judgment was recovered against L. P. Sanger, he alone having been arrested; that said suit and judgment were nominally in favor of one Elias Smith, but the plaintiffs were the real parties in interest, and are still the owners, &c.; that the judgment was in full force and unreversed, &c. at the time of commencing the attachment proceedings; and that neither the said note or judgment had ever been paid or satisfied, &c.

The defendants demurred to the declaration, and the plaintiffs joined in demurrer.

*J. H. Raymond*, for defendants.

*J. S. Bosworth*, for plaintiffs.

*By the Court*, COWEN, J. The proceedings and declaration are well enough in treating the plaintiffs, though mere assignees of the debt for which they sued out the attachment, as the nominal creditors. It is no objection that the bond is taken to them in their own names. (*Vid.* 1 R. S. 713, 2d ed. § 10.) But the commissioner had no jurisdiction. The attachment was nominally against the property of J. Y. Sanger, L. P. Sanger, and D. Sanger, who were originally indebted on a joint and several promissory note, upon which all were sued in a circuit court of the state of Indiana, L. P. Sanger alone arrested, and judgment rendered against him alone. His property was attached here, but delivered to him on his executing the bond in question.

An attachment does not lie on a judgment of a neighbor

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ing state, for the simple reason that the 1 *R. S.* 765, 2d ed. which gives the remedy by attachment, does not extend it beyond a judgment rendered in this state. (§ 3.) It is true that the first section, (subdivision 2,) covers a debt on contract; and the declaration seeks to reach that ground by going behind the judgment. That cannot be done. The judgment extinguished the simple contract debt as to L. P. Sanger. We are told that this is the judgment of a neighboring state. But who can deny, since *Mills v. Duryee*, (7 *Cranch*, 481,) and *Hampton v. McConnell*, (3 *Wheat.* 234,) that a judgment in one of our sister states must be holden to work the same effect upon the original demand as if it were obtained in this court? At least the declaration shows no debt valid within the attachment law against L. P. Sanger; a thing made by the statute (§ 58) quite as necessary in an action on the bond, as it is against the absent debtor in the first instance.

Judgment for defendants.

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ALLAIRE vs. WHITNEY.

A. executed a memorandum under seal in February, stating that he had hired of W. a certain lot in the city of New-York, for one year from the first of May next, at \$1000 rent. He was induced to make the contract through the fraudulent representations of W. that the lot comprehended a certain other parcel of land, which, as it afterwards turned out, belonged to the corporation. A. discovered the fraud before the first of May; and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole, and occupied during the year. *Held*, in an action by W. for the rent, that A. was entitled to a deduction, by reason of the fraud, of at least what he was in good faith obliged to pay for the corporation lease.

A demise for a term commencing *in futuro*, passes a present interest in the term to the lessee.

A., immediately after the fraud, might have elected to treat the lease from W. as entirely void; not having done so, however, but having occupied under it during the term, his only remedy was by action or *recoupment* for the damages.

The same rule applies to purchases of personal property; and in neither case does the party waive his right to damages by merely acting in affirmance of the contract, after discovering the fraud.

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*Semble*, that actual damage is not necessary to the maintenance of an action: A violation of right with a possibility of damage is sufficient.

*Semle*, also, if one be led through fraud to contract that he will accept and pay for a chattel at a future period, he may maintain an action for the fraud before the period arrives, though he has paid nothing.

A right of action once vested can only be destroyed by a release, or the receipt of something in satisfaction.

ERROR from the superior court of the city of New-York. Allaire, the defendant in the court below, on the 9th of February, 1837, signed and sealed a memorandum stating that he had hired a water lot of Whitney for one year from the 1st of May then next, at \$1000 rent, payable quarterly. This action was brought for the rent. Allaire on the trial set up that he was induced to sign the memorandum through a fraudulent representation of Whitney that the lot comprehended a certain other parcel of land, which turned out to belong to the corporation of the city of New-York. Evidence was given tending to show the alleged fraud; and also that Allaire discovered it before his term commenced. Yet he took possession under the demise, after obtaining a lease of the other parcel from the corporation. Allaire claimed the right to have what he contracted to pay the corporation for the parcel mentioned, deducted from the rent, on the ground of the fraud. The court below charged the jury among other things, that though they found the alleged fraud; yet if they also found that Allaire discovered it before the 1st of May, and without offering to rescind his contract with Whitney or its being modified in any way, obtained his contract from the corporation, and afterward took possession under the contract with Whitney and held for the year, he thereby waived all objection on the ground of fraud, and was entitled to no deduction. To this Allaire's counsel excepted; and a verdict and judgment having been rendered in favor of Whitney, Allaire sued out a writ of error.

*C. O'Connor*, for plaintiff in error.

*E. Sanford*, for defendant in error.

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*By the Court, COWEN, J.* The court erred in their directions to the jury. We entertain no doubt that a present interest in the term passed from Whitney to Allaire for one year. (*Shep. Touch.* 241, 267, 272. *Woodf. L. & T.* 162, *Lond. ed. of 1804.*) It is entirely settled that when property is purchased on the faith of the fraudulent misrepresentation of the vendor, the vendee has an election either to repudiate the contract, or take the benefit of it, and when sued for the price agreed, to have deducted from it the damages which he has sustained in consequence of the fraud. (*Beecker v. Vrooman*, 13 *John. R.* 302. *Reab v. McAllister*, 8 *Wendell*, 116.) This has never been denied. That he receives a delivery or takes possession of the property sold after discovering the fraud, makes no difference in principle. The present case is entirely analogous. The damages sustained by the fraud were at least the amount of rent which Allaire was, in good faith, obliged to pay, for the corporation property; and the jury should have been instructed to deduct so much on the hypothesis put to them.

It is not necessary to deny, that where a vendee or a lesser takes or holds possession after he has discovered the fraud of his vendor or lessor, he shall not be allowed to rescind the contract; in other words, to say, as he always may do in the first instance, that the whole is void. Certainly the jury might well have been instructed in the present case, that Allaire had made the lease good by election; that he had waived the right to consider it a nullity. That, however, is a very different matter from a waiver of the cause of action or *recoupment*. When a man is drawn into a contract of sale or demise by fraud, a right of action attaches immediately, as much so as if trespass had been committed against him; and though he may affirm the transfer of interest and take the property, yet waiver is no more predicable of the cause of action, than where a man receives a delivery of goods which have been tortiously taken from him. The vendor or lessor was a wrongdoer when he committed the fraud; and no act of the injured party short

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of a release or satisfaction will bar the remedy, though it may mitigate the amount of damage.

The court below seemed to treat the contract in question as executory: whereas, it raised a clear *interesse termini*, as may be seen by the authorities already cited. *Shep. Touch.* 241, says, a lease for years to begin *in futuro* is grantable over. This shows that it is not a mere chose in action. But take it that a man fraudulently draws another into a contract to accept and pay for a chattel a month after: the vendee discovering the fraud on the next day, is it to be tolerated that he shall not have an action immediately? If he pay any thing, even no more than a cent, as earnest, there would be no doubt. But actual damage is not necessary to an action. A violation of right with a possibility of damage, forms the ground of an action. This was admitted by Powell, J. in *Ashby v. White*, (2 *Ld. Raym.* 948,) though he was against the action by an elector for refusing his vote. He puts the case of an action by the owner of an ancient market for erecting another market near his, which he concedes would form a ground of action without showing a diversion of toll. It goes, he admits, on the possibility that toll may be thus diverted. So, an action lies for diverting part of a stream to which a man is entitled, though it do him no injury, on the possibility that a continuance of the diversion for twenty years might bar his right. (*Nelson, J. in Crooker v. Bragg*, 10 *Wendell*, 260, 264, 265.) In the case at bar, Allaire might have been delayed and deprived of the chance of obtaining another convenient water lot for his business, perhaps any lot at all. Once establish, therefore, that in all matters of pecuniary dealings, in all matters of contract, a man has a legal right to demand that his neighbor shall be honest; and the consequence follows: viz. if he be drawn into a contract by fraud, this is an injury actionable *per se*. Indeed, it would not be difficult, in all such cases, to show the degree of actual damage. The time of the injured party has been consumed in doing a vain thing, or one comparatively vain; and time is money. It would



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not be difficult, therefore, to satisfy the more ancient and strict rule of the Year Book, (19 H. 6, 44, pl. 92,) viz. "That there must not only be a thing done amiss, but also a damage either already fallen upon the party or else inevitable." (*Waterer & Freeman, Hob* 267.) Fraud is a thing grievously amiss, and above all, odious to the law; and fraud in a contract can hardly be conceived without being attended with damage in fact.

A right of action thus being complete on the day of the contract in question, whether it be considered as creating an *interesse termini*, or an executory contract, there could be no waiver of it *eo nomine*. In *Baylis v. Usher*, (4 Moore & Payne, 790, 7 Bing. 153, S. C. nom. *Baylis v. Fisher*,) the landlord made a formal distress, but never removed the property, leaving it in the tenant's uncontrolled use. In an action on the case for an excessive distress, the defence was that no damage had accrued. Bosanquet, J. referred to and recognized the rule as laid down in *Willoughby v. Backhouse*, (4 Dowl. & Ryb. 539; 2 Barn. & Cress. 821, S. C.,) viz. "a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done.(a) Therefore the tenant does not waive his right of action for an excessive distress, though he afterwards enter into a written agreement with his landlord respecting a sale of the effects seized."

On any view I have been able to take of this case, I am of opinion that the judgment of the superior court must be reversed.

Judgment reversed.

(a) See *Bowman v. Teall*, 23 Wendell, 306.

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Butler v. The Mayor, &c. of New-York.

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**BUTLER vs. THE MAYOR, &c. OF NEW-YORK.**

A building contract provided, that in case of disagreement between the parties in respect to certain extra work, it should be appraised by two persons to be selected by the parties, and, in case of disagreement between the appraisers, then the appraisal to be made by an umpire: *Held*, that an award of the umpire pursuant to this arrangement was conclusive, and precluded a recovery for any thing beyond the amount fixed by it.

Due notice to the parties of the times and places appointed for the meeting of arbitrators, is to be presumed; and the party seeking to impeach the award for the want of such notice, must prove that it was not given.

Though one of the arbitrators appointed by the parties signed and sealed the award with the umpire; yet *held*, that it was to be regarded as the sole award of the latter, and the addition of the other signature might be treated as surplusage.

Arbitrators authorized to choose an umpire, are not bound to defer the choice until a disagreement between them; but may make it before proceeding to act upon the matters submitted.

The award in this case referring to the original contract; *held*, that both might be read as one paper, for the purpose of identifying the subject matter of the umpire's decision.

Where an award is ambiguous, the subject matter to which it relates may be identified by parol evidence.

Technical precision and certainty are never necessary in an award. If it be expressed so that plain men, acquainted with the subject, can understand it, that is sufficient, however short and elliptical the phraseology.

Where arbitrators were authorized to determine the increase or diminution in the cost of buildings by reason of extra work, which the contractor was bound to complete; *held*, that an award finding the contractor entitled to "receive \$2385,29 for the increased cost of said buildings, *after he shall have filled up,*" &c. (specifying a part of the extra work not then completed,) was not rendered totally invalid by reason of the latter clause.

If, in respect to that clause, the umpire exceeded his jurisdiction, the party by whom the money was to be paid had a right to insist that it should be regarded as mere surplusage, leaving the award to stand for the sum named as due immediately.

*Seemle*, that for the purpose of sustaining the award, the court would intend that the *filling up*, &c. was part of the extra work provided for by the contract; in which case, the finishing of it might properly be directed, or made a condition.

An award importing on its face a regular adjudication pursuant to the submission, cannot be impeached, when used collaterally, by oral evidence that the arbitrator either exceeded his jurisdiction, or omitted to decide on all the matters submitted.

*Seemle*, that in a court of law, an award good *by intendment* is not open to

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collateral impeachment, on the ground that the arbitrators transcended or fell short of the limits of the submission ; for the intendent being *presumptio juris et de jure*, can no more be contradicted than the legal effect of any other written instrument.

Otherwise, since the case of *Elmendorf v. Harris*, (23 *Wend.* 628,) in respect to want of notice of hearing to the party.

If an excess of jurisdiction appear on the face of an award, it is then void *pro tanto*, or *in toto*, according as the bad matter is, or is not separable from the good ; and a separation should always be made, if possible.

On a motion to set aside an award, it is examinable more freely than when used as the foundation of an action or defence.

*Quere*, whether the judgment of a domestic court of general jurisdiction can be impeached collaterally, by shewing want of notice to the defendant ; the record importing full jurisdiction ?

ERROR from the superior court of the city of New-York. The action in the court below was debt, brought by Butler to recover a balance due on a building contract. The contract was dated May 11th, 1835, and was under seal ; Butler thereby covenanting to build "The Halls of Justice" for the defendants, according to a specified plan—the defendants to pay by instalments. It provided for a superintendent or architect to direct the work, and contained this clause : "In case any alteration in the form, proportions or construction of the said building or work, as described in the said specifications and drawings, should, in the progress of the said building or work, be determined on by the said superintendent or architect, by which the cost of the said building may be diminished or increased, the amount of such diminution or increase shall, in case the said party of the first part and the superintendent or architect do not mutually agree upon the same, be determined by impartial appraisers to be chosen, one by the said party of the first part, and the other by the said superintendent or architect, or by an umpire to be appointed by such appraisers to decide between them in case of their disagreement."

The specifications, &c. having been departed from, it became necessary to act under the above clause of the contract. Butler and the architect not being able to agree, however, an instrument was made and signed by them, re-

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citing the said clause, and certifying that Butler had nominated T. Thomas, and the architect, P. J. Bogert, to make such appraisal, or appoint an umpire, &c.

The appraisers, before ascertaining whether they could agree or not, and, indeed, before acting under their appointment, selected A. Lawrence as an umpire, who, together with said Bogert, signed the following award: "New-York, April 3d, 1838. We the undersigned, appraisers chosen to examine and value the extras and omissions caused by reason of alterations in the form and construction of the buildings called the Halls of Justice, as provided for in the contract for said buildings between Horace Butler and the mayor, &c. dated the 11th May, 1835, having carefully examined the said extras and omissions, do hereby determine, that the said Horace Butler is entitled to receive from the mayor, &c. the sum of \$2385,29 for the increased cost of said buildings, after he shall have filled up the outside paved ways. Whereunto we have set our hands and seals on the day and date first above written."

Evidence was given tending to show that the filling up of the "outside paved ways" mentioned in the award, was a part of the extra work in question; that it had not been completed at the time of the appraisal; and that the labor and materials necessary for that purpose would cost about \$100.

On the defendants offering the award in evidence, the plaintiff raised the following objections: 1. That the award was not the act of the umpire, but of the umpire and another jointly; it being signed by him and one of the appraisers. 2. That the appraisers had no power to appoint an umpire until after a disagreement between them. 3. That the award did not purport to be an appraisement, within the terms of the contract and submission, viz. an appraisal or ascertainment of the diminution or increase of costs, &c. during the progress of said building or work; but purported to be an award upon a general submission of differences between the parties. 4. That whether the

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one or the other, it was irregular and void by reason of the words—"after the said Butler shall have filled up the outside paved ways"—as that clause showed the award was not final in respect to the matters submitted. These objections were severally overruled; and the award was read in evidence. The plaintiff next insisted that the award could not be effectual for any purpose, unless the defendants proved that he had notice of the meeting of the appraisers, &c. The court, however, decided otherwise; holding that such proof on the part of the defendants was unnecessary.

The plaintiff then offered proof of the actual value of his extra work, &c.; but the court rejected the evidence. Offers were also made by him to show that the umpire had made improper allowances to the defendants—that he had gone beyond the cost of alterations, and had credited the defendants with damages for defects in the plaintiff's work on parts of the building other and distinct from the alterations. The court, however, held the award conclusive that no matters had been submitted and passed upon beyond the umpire's jurisdiction. In short, they received and acted upon the award as a complete bar to any recovery on the original indebtedness, and allowed the plaintiff to recover no more than the amount of the award. A verdict and judgment was rendered in his favor accordingly; and he having excepted to all the above decisions, brought error to reverse the judgment.

*C. O'Conner*, for plaintiff in error.

*G. F. Tallman*, for defendants in error.

*By the Court*, COWEN, J. Clearly, it was not necessary to show notice to Butler, by proof *aliunde*, of the times and places when the arbitrators met. Due notice must be presumed, till Butler proved the contrary; which he did not do.

It is no objection to the award, that Boger signed and

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sealed it with the umpire. (*Caldw. on Arb.* 42, 3. *Soulsby v. Hodgson*, 3 *Burr.* 1474. *Beck v. Sargent*, 4 *Taunt.* 232. That does not negative its being the sole award of the umpire. The signature and seal of Bogert indicates his assent, but that is mere surplusage, and may be rejected as such.

The choice of Lawrence as umpire was just as well before disagreement as after. Indeed, this is said to be the better time for appointing an umpire. (*Kyd on Awards*, 87.)

No one can read the award, in connection with the articles to which it refers, without understanding that the subject matter was the alterations, &c. mentioned as matter of arbitration by the articles. These being expressly referred to, must be read as if recited at length in the award; and nothing can be found there beside those alterations to which it could, with any propriety, be applied. The umpire, in effect, declared accordingly that he had examined the alterations, and fixed the increased cost. The meaning and application of the added words as to the paved ways, were shown by parol, as they might be. Indeed, Butler did not pretend there was any difficulty in understanding and fulfilling the terms on which the sum awarded was declared to be absolutely due. Technical precision and certainty are never necessary in an award. If it be expressed in such language that plain men acquainted with the subject matter can understand it, that is enough, no matter how short and elliptical. (*Matson v. Trower, Ry. & Mood. N. P. Cas.* 17. *Hays v. Hays*, 23 *Wendell*, 363, 366, 7.)

The award was in substance that the cost of the alterations, &c. were \$2385,29, less the expense of Butler's filling up the outside paved ways. Here was a step to be taken by Butler in order to make the sum payable, and, if you please, in order to liquidate the amount. Yet it is an assessment and declaration of the cost of alteration, certain within the meaning of the law both as to amount and terms of payment, because both could be made certain. Several

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cases are cited in *Watson on Arb. and Award*, 122, 3, 4, of much greater apparent uncertainty so long as the courts stopped at the face of the award. But, on looking beyond it, and finding the amount ascertainable by matter *aliunde*, it was agreed that the awards cou'd be sustained as sufficiently final and certain. A question of certainty on an award quite as vague as the present, if not more so, has been of late very fully considered by the K. B. and on error to the exchequer chamber, in *Cargey v. Aitcheson*, (3 Dowl. & Ryl. 433, 2 Barn. & Cress. 170, S. C.; 2 Bing. 199, and M'Lel. R. 367, S. C. on error;) and the award sustained. At any rate, if the condition of filling up the ways was a nullity on account of the umpire having exceeded his authority, or for uncertainty, or any other reason, it may, according to the case last cited, be rejected as mere surplusage, and then the award will stand absolutely for the sum declared to be due in money, and be payable presently.

So far, I think, the award may, without difficulty, be supported; and if there be nothing more in the defence, it was a bar to any claim for alterations exceeding in amount the sum awarded. If it were necessary, we must intend that the filling up of the paved way was a duty which some how related to the alterations mentioned in the original contract.

The only remaining question arises on the offer to show an excess of jurisdiction in subject matter; viz. that the umpire, though tied up by a special submission to assessing the value of the alterations, went beyond that and assessed damages in favor of the defendants for defects in the body of the work and struck a balance. This, I admit, was beyond his vocation; but I have not been able to see that he did so, by any thing in his award. I have mentioned our duty of intendment as to the paved ways. If they related to the alteration, the finishing might properly be directed, or made a condition. Such intendment is here more than a common presumption. When in a court of law it is said, an award is good by intendment, it means that such is the legal effect of the instrument. The intendment is there

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fore *presumptio juris et de jure*, and can no more be contradicted than the legal effect of any other written instrument. If there appear to be an excess of power on the face of the award, that is one thing. The award is then either void *pro tanto*, or *in toto*, accordingly as the bad matter may be separable from the good or not. If it be inseparable, the whole must fall together, though you always make a separation if possible. (*Nichols v. The Rensselaer Co. Mutual Ins. Co.*, 22 *Wend.* 125, 129.) The award is in terms or in effect a declaration by the parties themselves through their agents, that the proper matters have been considered and examined; and, as a general rule, nothing thus declared can be contradicted on trial in a court of law. I say as a general rule; and I can hardly feel a doubt on the decisions in this state, that whether the submission be general or special, you cannot by extrinsic evidence show either an omission to award on every branch of the subject, an award on a matter not submitted, or, till the late decision by the court for the correction of errors in *Elmendorf v. Harris*, (23 *Wend.* 628,) prove the want of notice of hearing to the party sought to be charged. This is, I apprehend, even now the common law of England, (*Braddick v. Thompson*, 8 *East*, 344;) for in *Elmendorf v. Harris*, no British case was found to the contrary which proceeded on the common law: A case on the Scotch law, decided by the house of lords in England, was indeed cited to the contrary; but the law of Scotland is based on the civil law. No cases were cited, on the argument of this cause, wherein it was ever holden that in a suit at law you may show by parol an excess of jurisdiction in the subject matter. I confine the rule to a regular suit, because on motions to set aside awards, intended for enforcement by a rule of court, or to pass summarily into a judgment under the revised statutes, they are examinable more freely and to a certain extent on the rules which prevail in chancery—where alone, I apprehend, could Butler have the present award corrected in respect to the admission or exclusion of improper items, whether within or without the power of the umpire. Such



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was admitted to be the rule, both of England and this state, by Wilde, J. in *Bean v. Farnam*, (6 *Pick.* 269, 273, 4,) and it was departed from in that case only because in Massachusetts the subject could not be reached by the chancery power. You may also, perhaps, impeach an award by averring or proving matter *aliunde* which shews it utterly indefinite or uncertain in any respect whereof non-performance is predicated. (*Cargey v. Aitcheson*, before cited.) But that goes on the doctrine of oral evidence touching ambiguity. I know, that when *Cargey v. Aitcheson* came to be considered on error, it was surmised by Best, C. J. who delivered the opinion, that you may also aver the arbitrators did not act upon every thing contained in a special submission. But this was mere surmise; and he admits that a contrary rule was laid down by Lord Ellenborough in *Randall v. Randall*, (7 *East*, 81, 3,) even on a motion for attachment. (1 *M'Lel.* 372. 2 *Bing.* 199.)

Jurisdictional intendments in support of an award, are at least as strong as they are in favor of a judgment rendered by a domestic court of general jurisdiction. It is often said, that every intendment shall be made to support the decision of arbitrators, it being made by judges of the parties' own choosing. And it would certainly be a singular objection against a record, in an action on a judgment, or in answer to it when pleaded in bar, that the judge at nisi prius received in evidence, and allowed the jury to assess damages upon, some matter without the jurisdiction of the court—some matter of trespass, for instance, in an action of assumpsit, or some matter of imperfect obligation, over which he had no jurisdiction in any form of action—or that any thing belonging to the case was improperly excluded. Even that the party has had no notice, would be an objection, never yet, I apprehend, allowed in such case, against the inference arising on the record, though I admit there are *dicta* which countenance its reception.

On the whole I am of opinion that the judgment of the superior court should be affirmed.

Judgment affirmed.

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Smith v. The Saratoga County Mutual Fire Ins. Co.

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**SMITH vs. THE SARATOGA COUNTY MUTUAL FIRE INSURANCE COMPANY.**

Where a policy issued by a mutual fire insurance company contained this clause—

“The interest of the assured in this policy is not assignable without the consent of said company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void, and of no effect.” *Held*, that an assignment of the *policy* without the consent provided for, was equally fatal to the claims of the assured as an assignment or sale of the *subject* of insurance.

A clause of this nature does not nullify the *assignment*, merely, but operates upon the *policy*.

A policy of insurance against fire is, in its nature, assignable, so as to pass an equitable interest to the assignee.

ASSUMPSIT, on a policy of insurance against fire, tried at the Oswego circuit, before GRIDLEY, C. Judge, June 26th, 1840. The insurance was for \$2400 on the plaintiff's tannery &c. for the term of five years, commencing in February, 1836, when the policy was issued. It recited that the plaintiff “had become a member of the Saratoga County Mutual Fire Insurance Company,” &c.; and contained this clause: “The interest of the assured in this policy is not assignable without the consent of the said company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void, and of no effect.” The property insured was mostly destroyed by fire on the 7th of March, 1839. The written application for insurance contained the following statement: “The property is mortgaged to E. M. Gilbert & Co. for \$3000, to be paid in tanning, together with the dwelling house. The applicant wishes an assignment to E. M. Gilbert & Co. for the amount of \$2000,” &c.

The defendants proved that by a written assignment under seal, duly executed by said plaintiff on the 17th of September, 1836, he had assigned and transferred *the policy*, and all *rights and claims which might arise thereon*, to

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John Williams. The consideration expressed in the assignment was one dollar.

The plaintiff then gave in evidence a mortgage dated Oct. 24th, 1835, executed by the plaintiff to Elisha M. Gilbert and said John Williams, to secure the payment of \$3000; and it was admitted by the defendants that said Gilbert and Williams composed the firm of E. M. Gilbert & Co., referred to in the application for insurance: and further, that the said firm had been dissolved, and the whole interest in the mortgage transferred to the said Williams, previous to September 17th, 1836 the date of the above mentioned assignment.

The defendants' counsel objected at the trial that the plaintiff could not recover unless he proved the assignment to have been made with the defendants' written consent; or that they had in some way waived their rights in this particular. The circuit judge overruled the objection; holding, and so directing the jury, that the assignment in question, even without any consent of the defendants, constituted no defence. Verdict for the plaintiff of \$2087,11. The defendants' counsel having excepted, now moved for a new trial on a bill of exceptions

*M. T. Reynolds*, for the defendants.

*J. A. Spencer*, for the plaintiff.

*By the Court*, BRONSON, J. The point was specially taken, that the plaintiff could not recover without showing that the defendants had consented to the assignment of the policy, or had in some way waived their right to make the objection. The judge decided the point against the defendants, and they excepted to his opinion. This presents the broad question, whether an assignment of the policy without the consent of the company renders the contract void.

The clause of the policy touching this question is as follows: "The interest of the assured in this *policy* is not assignable without the consent of the said company in writing; and in case of any transfer or termination of the interest of

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the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect." I have felt some difficulty in the construction of this clause and have tried to read it, as the plaintiff's counsel reads it, so that it will apply to the plaintiff's interest in the *subject* insured, and not to the *contract*. But the language is, that the "*policy* is not assignable;" and as the condition is a sensible one as it stands, I do not see how we can substitute another word without making a new agreement for the parties. And besides, there was no occasion for a condition rendering the contract void on an assignment of the *subject* insured, for it had been so expressly provided by the charter of the company. (*Stat.* 1834, p. 532, § 10.) The insured is a member of the company, not only by the charter, (§ 2,) but by the express terms of the policy.

If we could separate the clause into two parts, and make the last branch apply to the *subject*, while the first applies to the *policy*, the plaintiff might, perhaps, succeed. We should then have a declaration, that the "policy is not assignable without the consent of the company;" but not followed by nullifying words—those words, as they stand in the clause, applying in the supposed case, to the *subject* only. But I do not see how we can separate the clause into parts in this way. The parties seem to have been speaking of the same thing throughout, to wit, the policy. The form of expression is the same in the last, as it is in the first branch of the sentence, and they are tied together by a copulative conjunction. "*The interest of the assured* in this policy is not assignable without the consent of the said company in writing; *and* in case of any transfer or termination of *the interest of the assured*," [the ~~interest~~ already mentioned, to wit, in the *policy*] "without ~~such~~ consent," [consent to the assignment of the *policy*] the ~~contract~~ shall be void. There is a further reason for supposing that the parties were all along speaking of the policy, and not the subject, because, as we have already seen, the charter of the company renders the policy void when the subject is assigned, and there was no occasion for saying any thing on that point in the contract.

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The case then comes to this: The parties have agreed that the contract is not assignable without the consent of the company, and that in case of a transfer without such consent, the policy "shall thenceforth be void and of no effect." The assured has assigned without such consent, and it seems to follow as a consequence that the policy is "void and of no effect." However strongly we may desire to get rid of this conclusion, I do not see how it can be done. The parties must abide by the contract they have made.

It has been ingeniously argued, that as the policy is declared "not assignable," it is the *assignment*, and not the *policy*, which is void. But, in its own nature, the policy is assignable, so as to pass an equitable interest to the assignee; and by express stipulation, also, the policy may be assigned, provided the written consent of the company is obtained. It is not assigning merely, but assigning *without consent*, which is forbidden. And besides, the plaintiff's argument is all built on the first part of the clause, while, as has already been seen, we must look at the whole of it: and doing so, it then appears that the parties not only contemplated a "transfer" of the policy, but a transfer without consent: and they provided for that particular case, by declaring that the *policy*—not the *assignment*—should "thenceforth be void."<sup>(a)</sup>

NELSON, Ch. J. and COWEN, J., being members of the company, gave no opinion.

New trial granted.

(a) See 1 Phil. on Ins. 35, 6, 7



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Commercial Bank of Lake Erie v. Norton.

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**COMMERCIAL BANK OF LAKE ERIE vs. NORTON & Fox,  
impleaded, &c.**

A copy of a note or bill of exchange subjoined to a declaration, pursuant to the act of April 25, 1832, c. 276, makes no part of the declaration with a view to questions of variance between the pleadings and proofs.

Where H. testified that he was the general agent of a firm, entrusted with the sole charge of their business, and that as such he had been in the habit of drawing drafts and making notes and endorsements for them; *held*, sufficient to go to the jury as a ground for inferring that he had authority to bind his principals by an *accommodation acceptance*, though the power conferred on him by the articles of copartnership did not extend so far, and he had never before attempted to bind the firm in that way.

It is not necessary, in order to authorize the inference of general agency, that the person should have done an act the same in *specie* with that in question: If he have usually done things of the same general character and effect, with the assent of his principal, that is enough.

An agent cannot delegate any portion of his power requiring the exercise of *discretion* or *judgment*: otherwise, however, as to powers or duties merely *mechanical* in their nature.

Hence, if empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself; and it will bind the principal, though naming the delegate, and not the agent, as the one exercising the power.

In general, the acceptor of an accommodation bill of exchange, must, in respect to the holder, be regarded as principal, and cannot defend on the ground of want of consideration between him and the drawer; and this, though the holder took the bill from the person to whom it was lent, with full knowledge of its character.

Otherwise, if it be shown that the plaintiff is not a *bona fide* holder; as that he took the bill with knowledge of its having been accepted for some purpose different from that to which it was applied.

Where plaintiffs have taken and discounted a bill before acceptance; *semble*, that the acceptors are not estopped from disputing their liability on the ground of want of consideration.

But a consideration of some kind, (e. g. forbearance toward the drawer, &c.) will be presumed till the contrary be shown; and the acceptor must negative every possible intendment.

A naked precedent debt of another, is not *per se* a sufficient consideration to sustain a promise or acceptance.

The legal effect of a note can no more be contradicted than its direct expressions. *Semble*, that the words, "value received," in a special guaranty of the debt of a third person, or in a note made and delivered for the like purpose, are not open to contradiction by oral evidence.

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**Commercial Bank of Lake Erie v. Norton.**

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Where one borrows money and draws on another who afterwards accepts, it should be intended that the latter had originally authorized the drawer to borrow on these terms ; and then the transaction will be equivalent to a loan made on the request of the acceptor. *Semble.*

**ASSUMPSIT**, tried at the Erie circuit, before GRIDLEY, C. Judge, August 29th, 1840. The plaintiffs sought to recover as endorsees of two bills of exchange drawn by Gillespie, Joice & Co., on E. Norton & Co., payable to Gillespie & Woodruff, at sixty days after date. The firm of E. Norton & Co. was composed of said Norton and Simeon Fox, two of the defendants, who alone defended the suit.

The acceptance on each of the bills was in his form : "E. Norton & Co.—Per A. G. Cochrane ;" and was in Cochrane's hand-writing.

The bills were discounted on the day of the date, by the plaintiffs for the drawers, and were afterwards accepted for the drawers' accommodation ; the defendants Norton and Fox having no funds of the drawers, but the latter being then largely indebted to them.

Henry Norton testified on the trial that he directed Cochrane to accept these bills, the latter being the book-keeper of E. Norton & Co. As to Henry's own authority, he testified that he was the general agent of E. Norton & Co., financial and otherwise, they not interfering in the business but being engaged mostly elsewhere ; that, with their knowledge and assent, he had been in the habit of drawing drafts, making notes and endorsements for them ; though, by the written articles of co-partnership between E. Norton and Fox, his (the witness') power was more limited.

The defendants' counsel moved for a nonsuit upon the ground, that the acceptances were made without authority ; but the circuit judge denied the motion, and the defendants' counsel excepted. He further insisted at the trial, that the acceptances were without consideration, and therefore void. The circuit judge ruled the contrary ; whereupon the said counsel again excepted. Verdict for the plaintiffs. The defendants now moved for a new trial on a bill of exceptions.

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*E. Norton*, for defendants, insisted, that the bills having been discounted and the avails paid to the drawers before any preence of acceptance, and having been accepted for the accommodation of the drawers, the acceptances were without consideration and void. (*Chitty on Bills*, 79. *Coddington v. Bay*, 20 *John. R.* 637. *Rosa v. Brotherson*, 10 *Wend.* 85. *Ontario Bank v. Worthington*, 12 *id.* 593. *Darnell v. Williams*, 2 *Stark. R.* 166.) Again, the acceptances were made by Cochrane without authority from the defendants, and are not binding on them. (1 *R. S.* 457, § 6. *Stackpole v. Arnold*, 11 *Mass. R.* 27.) The authority of Henry Norton, if he had any, could not be delegated. (2 *Kent's Com.* 633. *Chitty on Bills*, 36. *Emerson and others v. The Providence Hat Manuf. Co.* 12 *Mass. R.* 237.) If the acceptances are to be sustained at all, they are to be regarded as made by Henry Norton; and then there is a material variance between the acceptances declared on and those proved. (1 *Mann. & Ryl.* 66.) But Henry Norton was not authorized to make these acceptances. Even if a general agent, he was not authorized to make *accommodation acceptances*. (*Beals v. Allen*, 18 *John. R.* 363. *Chitty on Bills*, 35, note. *Odiorne v. Maxcy*, 13 *Mass. R.* 181. *Meech v. Smith*, 7 *Wend.* 315.)

*H. K. Smith*, for the plaintiffs. An agent having general power to conduct the financial business of his principal, to draw drafts, make endorsements, &c. may bind his principal by an acceptance. Where one holds another out to the world as his general agent, he will be bound by his acts, as such, though transcending his private instructions. The acceptances in this case were made at the request and under the direction of Henry Norton. Cochrane was a mere amanuensis in the business. A general agent may delegate his authority for some purposes. He is not bound personally to perform all duties within the scope of his agency, but may act, mechanically at least, through clerks, &c. There was no variance. The counts were general; and the acceptances proved were made by the defendants



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acting through their agent. As to the alleged want of consideration, the counsel cited and commented upon the following cases: *Laxton v. Peat*, (2 Camp. 185;) *Kerrison v. Cooke*, (3 id. 362;) *Fentum v. Pocock*, (5 Taunt. 192;) *Raggett v. Armorr*, (4 Taunt 730;) *Harrison v. Courtauld*, (3 Barn. & Adol. 36;) *Murray v. Judah*, (6 Cowen's Rep. 492.)

*By the Court*, COWEN, J. The question of variance does not arise on the case, though it was taken at the trial. The counts were general, with a literal copy of the bills subjoined. Though the action be upon the statute of 1832, (*Sess. L. of 1832, p. 489*), the copy served makes no part of the declaration. It need not, therefore, be stated according to its legal effect. An exact copy is clearly enough, for the reason that gives due notice. The defendants are not misled.

But Henry Norton, it is said, did not appear on the proof to have had any adequate power to accept. There was, however, at least, evidence of authority sufficient to go to the jury; and all the judge did, on this point being started, was to refuse a nonsuit. I admit that the powers conferred on him by the defendants' articles of copartnership did not reach accommodation acceptances; nor did it appear that he had ever made such an acceptance before. But he said he was the general agent of the defendants' firm, having the sole management of the business; and had, with the defendants' knowledge, drawn drafts and made notes and endorsements for them. True, he did not mention the specific act of acceptance; but his general powers in the business, and the usage of putting their names to commercial paper in all other shapes, was the same thing, and calculated to raise an inference in the public mind, that he had such a power as to this. It is not necessary, in order to constitute a general agent, that he should have before done an act the same in specie with that in question. If he have usually done things of the same general character and effect with the assent of his principals, that is enough. A. holds himself out to the world as B.'s part

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ner; this authorizes B. to do in the name of both, all things which one partner can do in the name of the firm; and, among others, to draw, accept and endorse bills and notes. This is on the principle that one partner is the general agent of the concern. Any other agent recognized as holding the like power, may do the same thing. The agency of H. Norton extended to the whole business of the defendants. Neither of the latter pretended to interfere. Whatever transaction, therefore, the world might regard as pertaining to that business, and clearly an acceptance is one, ought to bind the firm. It is like the case stated by Malynes—a known servant taking up moneys beyond the seas upon his master's account, and drawing a bill upon him. He is liable, though he refuse to accept; because, adds the writer, it is understood that the money is obtained on his credit, unless he have made public declaration denouncing his servant to the brokers of exchanges and otherwise. (*Mal. Lex. Merc. pt. 3, ch. 5, § 6, p. 264, ed. of 1656.*) Chitty says, the authority to draw, endorse or accept, by procuration, need not be special; “but the law may infer an authority from the *general nature of certain acts* permitted to be done, and usual employ is evidence of an authority.” (*Chit. on Bills, 35, a, Am. ed. of 1839.*) These are very nearly the words of Lord Eldon, Ch. in *Davison v. Robertson*, (3 *Dow's Parl. Rep.* 218, 229,) whom Chitty cites. Henry Norton was the factotum of the firm. A more comprehensive general agency can hardly be conceived.

But it is said he could not delegate the power to accept. This is not denied, nor did he do so. The bills came for acceptance; and having as agent made up his mind that they should be accepted, he directed Cochrane, the book keeper, to do the mechanical part—write the acceptance across the bills. He was the mere amanuensis. Had any thing like the trust which is in its nature personal to an agent, a discretion for instance to accept what bills he pleased, been confided to Cochrane, his act would have been void. But to question it here would be to deny that

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the general agent of a mercantile firm could retain a carpenter to make a box, or a cooper to make a cask. The books go on the question whether the delegation be of a discretion. Such is the very latest case cited by the defendants' counsel; (*Emerson v. The Prov. Hat Manufactur. Co.* 12 *Mass. Rep.* 237, 241, 2;) and the latest book. (2 *Kent's Com.* 633, 4th ed.) *Blore v. Sutton*, (3 *Meriv.* 237,) is among the strictest cases I have seen. There the clerk of the agent put his own initials to the memorandum, by direction of the agent; and held, insufficient. *Henderson v. Barnewall*, (1 *Young & Jerv.* 387,) followed it. Both were cases arising under the statute of frauds, which requires that the memorandum should be signed by the principal or his agent; and I admit, it is very difficult to distinguish the manner of the signatures there from that now in question by *Cochrane*. Every thing there seems to have been mechanical merely, as here; and there may be some doubt, I should think, whether such cases can be sustained. At any rate, in our attempt to apply them, we are met with a case as widely the other way. (*Ex parte Sutton*, 2 *Cox*, 84.) The rule as there laid down is, that "an authority given to A. to draw bills in the name of B. may be exercised by the clerks of A." Such is the marginal note, and it is entirely borne out by the case itself. Peter Marshall wrote to Lewis & Potter authorizing them "to make use of his name by procuration or otherwise to draw bills on G. & J." The clerk of Lewis & Potter drew the bill, signing thus: "By procuration of Peter Marshall, Robert Edgecumbe." The lord chancellor put it on the ground that the signature of the clerk would have bound Lewis & Potter, had he signed their name under the general authority which he had. We thus make very little progress one way or the other on direct English authority. Left to go on the principle of any other English case I have seen, and there are many, all we have to say is, I think, that the agent shall not delegate his discretion; but may at least do any mechanical act by deputy. I do not know that the language of Lord Ellenborough in *Mason v. Joseph*, (1 *Smith's Rep.* 406,) has

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been any where directly carried into an adjudication. But it sounds so much like all the cases professing to go on principle, that I can scarcely doubt its being law. His lordship said, "It is true an attorney appointed by deed can not delegate his authority to a third person. He must exercise his own judgment on the principal subject for the purpose of which he is appointed; but as to any mere *ministerial* act, it is not necessary that he should do it in person, if he direct it to be done or upon a full knowledge of it adopt it. Suppose for instance he had got the gout in his hands, and could not actually sign himself, he might have authorized another to sign for him."

But the point most confidently pressed against the plaintiffs is, that the drawers having had no funds in the defendants' hands, the latter are entitled to the same defence as if the drawers themselves were plaintiffs. Put thus broadly, it is admitted to be a point directly against the almost entire current of British authority. (*Kerrison v. Cooke*, 3 *Camp.* 362. *Raggett v. Azmore*, 4 *Taunt.* 730. *Fentum v. Pocock*, 5 *id.* 192. *Carstairs v. Rolleston*, *id.* 551. *Harrison v. Courtauld*, 3 *Barn. & Adolph.* 36. *Nichols v. Norris*, *id.* 41, *note.*) The cases in 3 *Camp.* and *Taunt.* were cited and recognized as sound law in *Murray v. Judah*, (6 *Cowen*, 492.) And they all hold that the acceptor of an accommodation bill must, in respect to the holder, be considered as the principal; and some of them say that he cannot divest himself of that character even though the holder took it from the person to whom it was lent, with knowledge that it was accommodation paper. In such case, accordingly, though the holder release, or give time to the drawer or endorser who borrowed the bill, that does not discharge the acceptor. No doubt, the want of *bona fides* in the holder will let in a defence that the bill was accepted without consideration. But is there any want of good faith in advancing money and taking a bill from the borrower, with knowledge generally that it was accepted for his accommodation? There certainly is not, unless it be known that it was made for

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some purpose different from that for which it is used. (*Grant v. Ellicott*, 7 Wendell, 227.) But the question does not arise here. In this case, the money was advanced to, and the bills taken from the men to whom they were sent, without notice that the defendants were destitute of effects belonging to the drawers, much less that they would continue destitute.

The bills, however, were not yet accepted when the plaintiffs took and discounted them. This raises the objection that the latter discounted the bills on the credit of the drawers and endorsers alone, and relieves the defendants to a certain extent from the doctrine of estoppel. They did not induce the plaintiffs to loan money by previously putting their names on the paper; and the question is, whether there be any other principle on which they are liable. I think there clearly is. The acceptance of a bill of exchange to secure the debt of a third person is more than a mere special guaranty. The latter must show a consideration on its face. The acceptance of a bill imports a consideration; and though there was none in this case, as between the drawers and the defendants, yet it was not enough to stop with showing that. The defendants should, at least, have shown beside, that the bills were suffered to lie and to mature before they were presented for acceptance. They were drawn at sixty days after date and discounted on the day of their date, and, by acceptance presently, a delay to collect of the drawers would necessarily ensue. Till the contrary is shown it must be intended that the acceptance was with a view to such forbearance, and in fact worked that consequence. This leaves the case open to the presumption that the acceptances were in consideration of the forbearance. It is not enough to defeat a note or bill, that it appear on its face to have been made or accepted as security for a precedent debt of a third person. (*Popplewell v. Wilson*, 1 Str. 264.) It will still be intended that something collateral to the debt, and something adequate formed the consideration; and the maker or acceptor must negative

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every possible intendment. This was held in *Ridout v. Bristow*, (1 *Tyro.* 84, 1 *Crompt. & Jerv.* 231, *S. C.*; stated also in *Chit. on Bills*, 80, a, *Am. ed. of 1839*, note (g).) The subject is fully considered there, in the point of view now mentioned. It is not to be disguised, that a naked precedent debt of another is not *per se* such a consideration as will sustain a promise or acceptance. The books on guaranties all show that it is not, as well as the treatises on promissory notes and bills. Yet, nothing is more common than to rely on the note of A. taken as a security for the debt of B. It is like a special guaranty stating *value received*, which words, I take it, cannot be contradicted so as to destroy the guaranty. (See *McCrea v. Purmort*, 16 *Wendell*, 471, 2.) Accepting a bill or making a note is the same thing in legal effect; and it was held, in the case just cited from the exchequer reports, that the words "value received" could not be met and overcome by parol. (Vid. also *Woodbridge v. Spooner*, 3 *Barn. & Ald.* 233. 1 *Chit. Rep.* 661, *S. C.*) You can no more contradict the legal effect of the words in a note than its direct expression. (*Thompson v. Ketcham*, 8 *John.* 189.) Beside, the case is, I think, open to another intendment. When a man borrows money and draws on his friend, who accepts, it should be intended that the acceptor authorized him originally to borrow on the terms that he would accept, which is equivalent to a request of the loan on the part of the acceptor.

New trial denied.

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Alston v. The Mechanics' Mutual Insurance Company.

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**ALSTON vs. THE MECHANICS' MUTUAL INSURANCE COMPANY IN THE CITY OF TROY.**

Where the insured, on applying for insurance upon a building against fire, promised the insurers verbally that if they would grant his application he would discontinue the use of a *fire-place* in the basement and use a stove instead thereof; but, after obtaining the policy, persisted in using the fire-place as before: *Held*, that this avoided the policy.

A *representation*, within the meaning of that term as applied to policies of insurance, may, like a *warranty*, be either *affirmative* in its character, or *promissory*.

A *warranty*, being matter contained in the policy, is fatal to it, if violated only in the letter. Otherwise, as to a representation; for this being matter *aliunde* requires only a *substantial* compliance. ●

A representation, whether promissory or affirmative in its nature, must relate to something material to the risk.

MOTION to set aside the report of referees. The action was on a policy of insurance against fire upon a brick house of the plaintiff; and the policy after describing the height of the house above the basement, added—"which basement is privileged as a cabinet-maker's shop." The cause was referred to referees.

On the hearing before the referees, after the plaintiff had made out a *prima facie* case and rested, the defendants proved, among other things, that before obtaining the policy, the plaintiff used a fire-place in the basement of the house; but on the defendants' refusing for that reason to insure, he promised to abandon the use of the fire-place and confine himself to the use of a stove. The promise was entirely disregarded, and the house was burned soon after the policy was executed, the fire originating in the basement. The defendants relied upon the above promise and subsequent conduct of the defendant, as showing a misrepresentation which should bar the plaintiff's right of recovery. The referees reported in favor of the defendants, and the plaintiff now moved to set aside the report.

*M. T. Reynolds*, for the plaintiff.

*D. L. Seymour & S. Stevens*, for defendants.

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*By the Court, COWEN, J.* The promise not to use the fire-place, which was considered quite material by both parties, was made, but grossly violated, and the house was burned down. There is no doubt that the policy was avoided by this breach of good faith, provided the promise as to the future condition of the shop can be considered a *representation*. It was said in argument that a representation must relate to a present fact. It generally does so; but no case has been cited showing that it may not be made of a prospective one. On the contrary, courts have certainly assumed that it may; for instance, that a ship will sail with a certain number of guns and men. (*Edwards v. Footner*, 1 Camp. 530. *Vid. also Bize v. Fletcher*, Doug. 284, 5; *Park on Ins.* 270, S. C., Lond. ed. 1809.) Indeed it seems to me that if representations are to be received at all, they must very often be, in effect, promissory, however they may be expressed; as if a representation be made in the present tense of a fact, the existence of which would be material to the safety of the ship or house insured during the whole time mentioned in the policy. This is a very common case both as to warranties and representations. Accordingly an eminent writer on insurance says, "A *representation*, like a warranty, may be either *affirmative*, as where the insured avers the existence of some fact or circumstance which may affect the risk, or *promissory*, as where he *engages* for the performance of something *executory*." (1 *Marsh. on Ins.* 450, Am. ed. of 1810, ch. 10, § 1.) No book was shown on the argument contradicting this, nor am I aware of any. A warranty is very commonly promissory, and if violated only in the letter, the policy is avoided. The only difference between that and a representation is, that the latter being collateral to and out of the policy, it is enough that it be substantially complied with. The same thing, whether in the present or future tense, which, in a policy, would be a warranty, would, out of it, affect the policy as a representation, if material to the risk.

Motion denied.



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Cameron v. McDonald.

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CAMERON vs. McDONALD.

Where, in summary proceedings instituted by a landlord to remove his tenant, the summons was served by copy, and the proof of service was simply that the tenant *was absent*, and that the copy was left *with R. residing on the premises*; HELD, insufficient, as not showing the tenant's absence from "his last or usual place of residence," or that the copy was left with a "person of mature age."

ON certiorari, to remove proceedings under the landlord and tenant act for the recovery of possession of demised premises. The proceedings were had before W. A. Bell, one of the assistant justices of the city of New-York, in favor of John McDonald, landlord, against Daniel D. Cameron, the tenant. The only facts important to a proper understanding of the points decided are sufficiently stated in the opinion of the court.

*J. W. Edmonds*, for the tenant.

*H. Hunt*, for the landlord.

*By the Court*, COWEN, J. There was no appearance by Cameron before the justice at any stage of the proceedings. The summons was not served on him personally; but (as stated by the constable in his sworn return) on "Isaiah Ridgeley, residing on the demised premises, Daniel D. Cameron being absent." The return is defective. The statute (2 R. S. 423, 2a ed. § 32) requires either personal service on the tenant, or if he be absent from his last or usual place of residence, by leaving a copy at said place with some person of mature age residing on the premises. It does not appear by the return that the tenant was absent from his usual place of residence. It is said merely, he was absent, without saying from what. Nor is it stated that Ridgeley was a person of mature age.

Proceedings reversed.

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Mohawk Bank v. Corey.

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**MOHAWK BANK vs. COREY & LIVERMORE, impleaded, &c.**

A note drawn payable at the bank of A., was endorsed by C. and L. for the accommodation of the maker, to enable him, as he told the endorsers at the time, to raise money at the bank for purchasing barley; instead of which, the maker caused the note to be applied in payment of a debt which he and V. owed at another bank: *Held*, not such a diversion of the note from its alleged object as to discharge the endorsers, it not appearing that, at the time of endorsing, the use to which it might be applied was at all important to them.

Otherwise, *semble*, had the note been made for the purpose of taking up another note in the bank of A. to which the endorsers were parties.

Where a bank received B.'s note, endorsed by C., L. and V., before it became due, in payment of other notes of B. endorsed by V. alone, thereupon delivering up the latter and discontinuing a suit commenced thereon; *held*, a sufficient *parting with value* to entitle the bank to the rights of a *bona fide* holder.

**ASSUMPSIT**, on a promissory note, tried at the Schenectady circuit, March 11th, 1840. The defendants were Borst, Corey, Livermore, and Voorhees—Borst being the maker of the note in question, Corey and Livermore first endorsers, and Voorhees second endorser thereof. Corey and Livermore alone defended the suit. On the trial they called Borst, the maker, as a witness, who testified to the following facts:

The defendants Corey and Livermore endorsed the note for his (Borst's) accommodation, to enable him to get it discounted at the Albany City Bank, with a view of raising money to buy barley: They (C. and L.) enquired what he was going to do with the money, and he told them he intended to buy barley. Corey hesitated some about endorsing, but whether before or after being told what the object of the note was, witness was unable to state. The note was offered at the Albany City Bank, and they refused to discount it. Subsequently, and before the note became due, he (Borst) transferred it to Voorhees, to be applied on a judgment which the latter held against Borst. It was endorsed by Voorhees and by him delivered to the plaintiff's attorney and agent, in payment and satisfaction

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of two other notes which Voorhees had endorsed for Borst's accommodation, and which were then held by the plaintiffs. Voorhees and Borst had suffered the last mentioned notes to be protested and sued by the plaintiffs; and these were delivered to Borst, and the suit thereon discontinued, on the plaintiffs' attorney and agent receiving from Voorhees the note in question. The judgment which Voorhees held against Borst was given to secure him as endorser of one of the notes so delivered up to Borst.

Upon the above facts the defendants' counsel asked the court to instruct the jury, that the diversion of the note in question, as testified by Borst, from the purpose for which Corey and Livermore endorsed it, was a defence as respected them; and that the plaintiffs, having taken it for a pre-existing debt, and parted with nothing valuable on the faith of it, were not entitled to recover as against C. and L. The circuit judge, however, held that the facts proved did not constitute a defence, and directed a verdict for the plaintiffs; to which the defendants' counsel excepted, and now moved for a new trial on a case.

*S. Stevens*, for defendants.

*M. T. Reynolds*, for plaintiffs.

*By the Court*, BRONSON, J. The endorsers, Corey and Livermore, lent their names to Borst, the maker, for the purpose of giving him credit, and he was at liberty to negotiate the note in any way he thought proper. Borst says he got them to endorse it for the purpose of enabling him to get it discounted at the Albany City Bank, to raise money to buy barley. But it does not appear that the endorsers had any interest in having it discounted by the Albany City Bank, or that the use which Borst should make of the money was in any way important to them. They merely asked Borst what he was going to do with the money, and he told them he was going to purchase barley with it. If

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the note had been made for the purpose of taking up another note in the Albany City Bank, to which the endorsers were parties, it would have presented a different question. But here, although the endorsers had the curiosity to enquire what use the maker designed to make of the note, they had no interest in the question; and, so far as appears, they would just as readily have lent their names if the maker had told them he wished to take up his notes in the plaintiffs' bank—the use which he afterwards made of the paper. Within the proper legal sense of the term, there has been no diversion of the note from the purpose for which it was made and endorsed. The endorsers lent their names for the purpose of giving the maker credit generally, and without any concern with the use which should be made of that credit.

But if there had been a diversion of the note from its proper use, the plaintiffs would still be entitled to recover. They not only took the note in *payment* of two other notes which they then held against Borst endorsed by Voorhees, but they *gave up* those securities. They also gave up, of course, the suit which had been commenced and was then pending on the two notes. This is a stronger case than that of the *Bank of Salina v. Babcock*, (21 Wend. 499.) There have been several other decisions to the same effect, which are not yet published.(a) It is not denied that the plaintiffs are *bona fide* holders of the paper, and it is equally clear that they paid a valuable consideration for it.

New trial denied.

(a) See *Bank of Saxdusky v. Scoville*, (24 Wend. 115.)

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Cole v. Sackett.

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## COLE vs. C. SACKETT and F. SACKETT.

The promissory note of a debtor given for a precedent simple contract demand will not operate as payment, so as to preclude the creditor from suing on the original consideration, though given under an express agreement that it was to be received in full satisfaction and discharge: Otherwise, if the note be that of a *third person*.

The case of *Arnold v. Camp*, (12 John. R. 409,) considered, and disapproved.

E. and C., being in partnership, gave their note for a precedent debt of the firm, under an agreement that it should be received in full satisfaction and discharge. Afterward they dissolved, E. agreeing, for a consideration received from C., to assume and pay the debt for which the note was given; in pursuance of which arrangement, C. took up the note, and gave his own in lieu thereof. *Held*, no bar to a recovery upon the original consideration.

DEMURRER to pleas. The declaration was in assumpsit, containing the common counts including an account stated. The pleas were—1. The general issue; 2. That the parties after the promises, &c., and before the commencement of this suit, accounted together concerning all the alleged cause of action, and found the balance due the plaintiff to be \$670,03 of which the defendants paid a part, and gave their promissory note to the plaintiff for the residue, which the latter accepted in full satisfaction and discharge: 3. The like accounting between the defendants and one H. N. Peck, as plaintiff's agent and assignee, with the like result, viz. a balance against the defendants of \$670,03; that, part of this was paid, and the note of the defendants delivered to the plaintiff, his agent or assignee, for the residue, which was accepted in full satisfaction and discharge; that, afterward said agent or assignee gave up the note to the defendants, and took in lieu thereof the individual note of E. Sackett, one of the defendants, for \$619,79, that said Sackett was then in good credit, but had since become insolvent; that, when the first note was given, the defendants were in partnership, but afterward and before giving the second note, they dissolved and settled, &c., C. Sackett allowing F. Sackett, the other defendant, a full consideration for his assuming, &c. the debt they owed the plaintiff; and that,

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in pursuance thereof, said E. Sackett took up their joint note, &c.

General demurrer to the second and third pleas, and joinder.

*Burr & Benedict*, for plaintiff.

*J. A. Spencer*, for defendant.

*By the Court*, COWEN, J. The declaration contains the common counts, including an account stated. The defendants plead, that the parties accounted together concerning the whole, and the defendants gave their promissory note for the balance, which the plaintiff accepted in full satisfaction. The short of the pleas is, that the defendants owed the plaintiff on promises, and made him another promise, which he took in satisfaction. The cases are certainly not uniform, singular as it may seem, that a debtor cannot thus pay off his creditor. Several cases are stated in *Arnold v. Camp*, (12 *John. R.* 409,) which as there understood and even applied, favor the doctrine that he may. It may be considered, however, at present, as entirely settled, that to operate as a satisfaction, the promise must be that of some third person; in other words, something over and above the original debt. A promise by note is a security of no higher degree than an implied promise; and the logic of these pleas is no more than saying, "Your precedent debt is discharged, because I promised to pay it in another form, and you accepted the latter promise as a satisfaction." What consideration is there for such an acceptance? The new promise to do a thing which the debtor was bound to do before—a thing which he now refuses to do, because he had promised again and again to do it! In these promising times there are I apprehend few debts which on such a theory are not in danger of being barred much short of the statute of limitations; for creditors, however unwilling, are many times obliged to accept promises as the only satisfaction they can obtain for the

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present. It is entirely settled, that a promissory note of the debtor in no way affects or impairs the original debt, unless it be paid. The creditor may notwithstanding recover on the original consideration, surrendering or cancelling the note at the trial. The note is a mere liquidation of the demand; and it being the duty of the debtor thus to liquidate and secure the demand, nay to do more, it follows, that an acceptance or even an express agreement to accept in consideration of such a short coming, is a *nudum pactum*. The third plea contains some additional machinery, viz. a second promissory note, not of both defendants, but one of one of them, the plaintiff giving up the note of both, &c. This adds nothing to the defence. The authorities which I think sustain the views belonging to this case are the following: *Muldon v. Whitlock*, (1 *Coven*, 290, 306;) *Olcott v. Rathbone*, (5 *Wend*. 490;) *Hawley v. Foote*, (19 *id*. 516, 17, and cases there cited;) *Frisbie v. Larned*, (21 *id*. 450, 452, and the cases there cited.)

I am of opinion that the demurrers to both pleas are well taken, and that there should be judgment for the plaintiffs.

Judgment accordingly.

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## BUTTERNUTS AND OXFORD TURNPIKE COMPANY vs. NORTH.

The general turnpike act, (1 *R. S.* 580, 2d *ed.*) confers no power on the commissioners to receive *conditional* subscriptions for stock; and a subscription conditioned that the road should be laid through a specified place, is contrary to public policy, and void.

ERROR from the Chenango common pleas. The action was upon a subscription for stock of the plaintiffs, containing an engagement to take stock, "upon condition that said road shall be laid by Fayette village and Guildford Centre." The commissioners for receiving subscriptions had obtained several signatures to this, and also to another absolute in its terms. The court below held that the defendant's signature to the subscription in question did

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not bind him ; and nonsuited the plaintiffs. They excepted, and after judgment in the court below, sued out a writ of error.

*H. R. Mygatt*, for plaintiffs in error.

*J. Clapp*, for defendant in error.

*By the Court*, COWEN, J. Subscriptions for stock under the turnpike act, (1 R. S. 581, 2d. ed.) to which the plaintiffs were subject, (Sess. L. of 1834, p. 137,) must be absolute. This act confers no power to make conditions ; and, to allow such a thing, would be contrary to public policy. Divers men would perhaps have their divers routes, and endeavor improperly to influence the course of the road. If the general subscription should contain a condition of this kind, there would be no stockholders till the road should be laid out accordingly ; and separate subscriptions containing various conditions, might work a fraud upon those who subscribe absolutely. The court below decided correctly.

Judgment affirmed.

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COONLEY vs. ANDERSON.

A mere *literal* variance between a contract as set forth in pleading, and the one produced in evidence, is immaterial.

A contract for a crop of barley to be delivered at a future day, specifying the price, but no time of payment, is, in *legal effect*, a contract to *pay on delivery*, and may be so declared on.

Where the declaration alleged a contract to sell "a crop of barley, *supposed to be* about nine hundred bushels," and the one produced in evidence was, to sell "a crop of barley, about nine hundred bushels ;" *held*, not a material variance.

So, the declaration stating a contract to deliver barley, "*on or before* the first day of November ;" *held*, not a material variance, though the contract given in evidence was, to deliver the barley "*by*" that day.

Where a contract is entered into for the delivery of barley at a particular place and by a given day, specifying the price, but no time of payment, the vendee, in an action for non-delivery, must aver and prove that he was ready and willing to *accept and pay*.



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But if the evidence shows he was ready at the appointed time and place to perform on his part, and the defendant did nothing, this is enough to sustain the averment without proving either a demand, or that he tendered or exhibited the money.

The averment of readiness to accept and pay, in such cases, does not require *direct proof*, but may be maintained by *circumstantial evidence*.

And *semble*, where a witness called in support of the averment has testified positively, but generally, that *the vendee was ready to accept and pay, &c.* the court cannot refuse to submit the cause to the jury, though on a cross-examination the witness stated he did not know of the vendee *having money for the particular purpose* on that day, but knew he had money about that time, &c.

ERROR to Onondaga C. P. *Coonley* sued *Anderson* in the court below for not delivering barley pursuant to agreement. The *first count* of the declaration stated, that the plaintiff, on the 18th August, 1835, agreed to buy, and the defendant sold to the plaintiff, *a large quantity, to wit, his, the defendant's crop of barley, to wit, nine hundred bushels of barley*, at the price of 62½ cents per bushel, to be delivered to the plaintiff by the first day of November then next, at Jordan in the county of Onondaga, *and to be paid for by the plaintiff on delivery*: averring that the plaintiff had always been ready and willing to accept and pay for the barley, to wit, at Jordan, &c., but the defendant did not deliver. 2d *count*, that the plaintiff on, &c. bargained with the defendant to buy *his, the defendant's certain other crop of barley, supposed to be about nine hundred bushels in all*, at the price, &c. to be delivered at Jordan *on or before* the first day of November then next, to be paid for, &c. as in the first count. Breach, as in first count.

On the trial it appeared that the plaintiff was a merchant and lived at Jordan, and the defendant lived about 16 miles from that place. The plaintiff, by his agent, made the contract with the defendant, and a written memorandum of the bargain, made by the agent at the time, was produced and read in evidence as follows—"Bo't of Eli Anderson *his crop of barley, about nine hundred bushels*, to be delivered at Jordan for 5 shillings per bushel, *by* the first day of November next. Navarino, Aug. 18, 1835." *Mason*, the plaintiff's clerk, testified, that the defendant did not deliver any barley in the year 1835: that the plaintiff was ready and

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willing to receive and pay for the barley all that fall—the plaintiff bought all that fall—barley was worth five shillings and nine pence per bushel at Jordan on the first day of November that year. On *cross-examination* the witness said, he did not know whether the plaintiff had any money to pay for the defendant's barley on the first day of November—but knows he had money to pay for barley about that time—can't say he had any money for that purpose on that day different from any other day. On *re-examination*, the plaintiff's counsel put several questions to the witness, as follows: 1. Was the plaintiff buying barley during all the months of October and November in that year as it was offered? 2. Can you say that he had sufficient money for that purpose about that day? [the first of November.] 3. Was the plaintiff desirous of buying barley on that day at five shillings per bushel? 4. Do you know of any time for 10 days before and 10 days after and including the 1st of November, when the plaintiff had not money enough to buy this barley at five shillings per bushel? 5. Did the plaintiff buy a large quantity of barley of Mr. Rhoades at five shillings and nine pence per bushel on that day? 6. Did you see large amounts of money in possession of the plaintiff about the 1st of November for the purpose of buying barley? To each of these questions the defendant objected on the ground that the evidence was immaterial, and the court sustained the several objections. The plaintiff excepted to each of the decisions. The witness further testified that the plaintiff had store room enough for the defendant's barley on the 1st of November; that the witness was engaged in buying barley for the plaintiff at his store in Jordan, both before and after the first day of November.

When the plaintiff rested, the defendant moved for a nonsuit, on the ground, 1. that the plaintiff had not given any evidence of a readiness or willingness on his part to receive and pay for the barley; and 2. that there was a variance between the proof and the contract set forth in the declaration. The court ordered a nonsuit; the plaintiff excepted, and now brings error.

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Coonley v. Anderson.

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*L. B. Raymond*, for plaintiff in error.

*F. G. Jewett*, for defendant in error.

*By the Court*, BRONSON, J. Although no time of payment was mentioned, the defendant was not bound to part with his property without receiving the stipulated price. (*Cook v. Ferral's adm'rs*, 13 Wend. 285. *Morton v. Lamb*, 7 T. R. 121. *Rawson v. Johnson*, 1 East, 203. *Bull. N. D.* 50. *Comyn on Cont.* 221, ed. '35.) In stating that the barley was to be paid for on delivery, the pleader has given the legal effect of the contract, and we must look elsewhere for a variance.

If the construction of the first count be, that the defendant agreed to sell 900 bushels of barley, there is a fatal variance between the contract laid and that proved. But it is unnecessary to consider that question, for I think the contract is set forth according to its legal effect in the second count. The bargain was for the sale and purchase of the defendant's *crop* of barley, which the parties supposed would amount to about 900 bushels; but whether it turned out to be more or less, it was the *crop* that was sold. And so the contract is laid in the second count. The words, "supposed to be," which the pleader has inserted before stating the conjectural quantity, do not alter the legal import of the contract as it is stated in the written memorandum. "His crop of barley about 900 bushels," and "his crop of barley *supposed to be* about 900 bushels," as here used, mean the same thing. There are more words in the count than in the memorandum but there is no variance.

According to the memorandum, the barley was to be delivered *by* the first day of November: the pleader states that it was to be delivered *on or before* that day. Here is no variance. It is said that all the barley was to be delivered *on* the first of November; but it is impossible to maintain that position. The parties never could have intended that the defendant should hire twenty or thirty teams so as to be able to deliver his whole crop on one

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day, nor that the plaintiff should be obliged to receive all the grain in one day. The contract was made in August, and the defendant was to deliver *by* the first day of November, and a delivery from time to time *on or before* that day would have been within the intention of the parties. Although the pleader has not got the very word, there is no departure from the legal effect of the contract.

The plaintiff was undoubtedly bound to prove the averment, that he was ready and willing to accept and pay for the barley; but it was not necessary for him to show a tender of the money, or a demand of the goods. The barley was to be delivered at Jordan where the plaintiff lived, and where he had a store to receive it; and if he was ready at the appointed time and place to perform the contract on his part, and the defendant did nothing, the plaintiff's right of action is complete. None of the cases on which the defendant relies lay down a different doctrine. In *Morton v. Lamb*, (7 T. R. 121,) the plaintiff averred that he was ready to *receive* the corn which the defendant had agreed to deliver, but did not add that he was ready to *pay* for it; and for that cause, the judgment was arrested. The case goes no further than to assert the general principle, that where concurrent acts are to be done by the parties, he who sues must aver that he was ready to perform on his part. The case of *Porter v. Rose*, (12 John. R. 209,) decides, that the averment of a readiness and willingness to pay, like other material averments, must be proved on the trial. *Topping v. Root*, (5 Cowen, 404,) is to the same effect. In neither of these cases was any proof whatever given of the plaintiff's readiness to perform on his part. *Cook v. Ferral*, (13 Wend. 285,) is much relied on, but it does not go a single step beyond the other cases. True, Sutherland, J. thought the plaintiff should have demanded the oats. But that was under special circumstances which do not exist in this case; and the decision was finally put upon the general doctrine, that a readiness to pay was a condition precedent to a right of action against the vendor.

In *Rawson v. Johnson*, (1 East, 203,) the plaintiffs aver

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red a readiness and willingness to accept and pay for the malt, and this was held sufficient without stating a tender. Lord Kenyon said, that under the averment as it stood, "the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it, and to have delivered the goods; but it cannot be necessary in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it." This case was followed in *Waterhouse v. Skinner*, (2 Bos. & Pul. 447. And see 2 Saund. 252, n, 3; *Chitty on Cont.* 351, ed. of 1839.) I am not aware that this doctrine has been departed from. It is founded in good sense, and ought to prevail.

Contracts for the sale and purchase of real property stand upon special grounds which do not touch those relating to the transfer of goods and chattels.

In this case, the clerk proved enough on his direct examination to make out the averment that the plaintiff was ready and willing to receive and pay for the barley; and although on the cross-examination the readiness of the plaintiff to pay on the first day of November was brought into some doubt, I am inclined to think the evidence sufficient to carry the cause to the jury, and, consequently, that a nonsuit should not have been ordered. It was for the jury to say how much credit was due to the positive declaration of the witness, that the plaintiff was "ready and willing to *receive* and *pay* for the barley all that fall." But should it be conceded that the evidence already given was insufficient to carry the cause to the jury, the witness should have been allowed to answer the questions put to him by the plaintiff on the re-examination. They were pertinent to the issue, and might call out answers tending to establish the only doubtful point in the plaintiff's case.

It seems to have been supposed that the plaintiff was bound to make out his averment by *direct* proof, and that no other kind of evidence was admissible. But such is

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not the law. Presumptive evidence was admissible upon this, as it is upon most other questions. Let us suppose a case, and one, too, which will include very little more than what appeared on this trial. The plaintiff lived at Jordan where the barley was to be delivered, and he had there sufficient store room to receive it. He was present, by himself or his agents, at the proper time and place, but the defendant did not appear. Barley had risen in value, and was worth more than the contract price ; the plaintiff, both before and after the day, was purchasing barley from others, and paying more than he had agreed to give to the defendant ; and he was paying out money for barley in such sums, or had in his possession or at his command upon the shortest notice, such sums of money as showed his ability to fulfil this contract had the defendant been ready to go on with it. Now, in such a case, it can hardly be doubted that the jury would be warranted in finding that the plaintiff was ready and willing not only to receive, but to pay for the defendant's barley on delivery. It was not necessary for the plaintiff to show that he did any particular act in relation to this contract, such as counting or exhibiting a sum of money, or saying to some third person—for the defendant did not attend—"Here I am, ready and willing to receive and pay for the defendant's crop of barley." All this may be inferred by the jury from circumstantial or presumptive evidence tending to that conclusion.

I think there was no substantial variance ; and if the evidence given was not sufficient to carry the cause to the jury, still the court should not have overruled the question put to the plaintiff's clerk.

**Judgment reversed.**

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Cushman v. Bailey.

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CUSHMAN and others vs. BAILEY & CONKLING.

C. loaned B. \$1000 for a year, leased him a building to be occupied as a store for the same period, and stipulated that his son should attend the store as B.'s clerk without specific compensation:—In consideration whereof, B. agreed to invest \$3000 in the store, conduct it during the year, and at the expiration thereof repay the \$1000 and surrender the premises if required, accounting for the business done, and rendering to C. *one equal third of all the profits, &c.* HELD, sufficient to constitute a partnership, especially as to third persons.

ASSUMPSIT by the plaintiffs against Bailey and Conkling, tried at the New-York circuit, December 18th, 1840, before EDWARDS, C. Judge. The sole question was, whether certain articles of agreement dated April 15th, 1837, between the defendants, constituted them partners in trade, and so jointly liable in this case. The terms of the agreement sufficiently appear in the opinion of the court. The circuit judge held, that the defendants were thereby constituted partners, to which the defendants excepted; and a verdict having been rendered for the plaintiffs, the defendants now moved for a new trial on a bill of exceptions.

*S. J. Wilkin*, for defendants.

*J. S. Bosworth*, for plaintiffs.

*By the Court*, COWEN, J. By the terms of the agreement in question, Conkling loaned to Bailey, for one year, the sum of \$1000, demising to him a store, and stipulating that his son should faithfully attend it as a clerk for the same term without specific compensation; in consideration whereof Bailey agreed to invest a capital of at least \$3000 in the business of store keeping, manage it during the same term, and at its expiration render an account of the business, and if required, pay over to Conkling the \$1000

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surrender possession of the store, and pay Conkling one equal third part of all profits made by the business of the store, and the business necessarily and properly connected with it. This agreement was acted upon; and I am of opinion, constituted a partnership. The agreement winds up with the essential criterion of a partnership, an indefinite share by moieties in the profits. It is scarcely possible that an agreement can be so framed, and not enure as a contract of partnership, especially with regard to third persons. (*Collyer on Partnership*, 43, a, and 44, *Am. ed. of 1839*. *Grace v. Smith*, 2 *W. Bl.* 998. *Waugh v. Carver*, 2 *H. Bl.* 235, 246, 7. *Champion v. Bostwick*, 18 *Wendell*, 175. *Dob v. Halsey*, 16 *John.* 34.)

New trial denied.

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STEELE vs. BABCOCK.

Where assignees of personal estate in trust for creditors requested A. to purchase a judgment against their assignor, then a subsisting lien on his real estate, whereupon A. accordingly did so, giving his own notes for the judgment and taking an assignment of it directly to himself; *Held*, no extinguishment of the lien, though the purchase was intended for the assignees' benefit, and they subsequently paid A.'s notes out of the trust funds.

The result would have been the same had the assignees purchased the judgment without the intervention of A., it not appearing that a satisfaction was intended; and this, *semble*, as well in equity as at law.

In equity, if trustees, by an unauthorized use of the trust funds, purchase a judgment, the *cestui que trust* may elect either to stand as the equitable owner of it, or to consider the purchase a wrong, and call the trustees to account for the funds thus misapplied; in which latter case the judgment will be regarded as belonging to the assignees in their own right. *Semble*.

A mortgagor who has parted with the equity of redemption, but against whom there are judgments constituting liens on the mortgaged premises, has still an interest that the property, when sold on the mortgage, shall bring enough to satisfy all the incumbrances; and hence where he withdrew a bid made by him at the sale, and allowed the owner of the equity of redemption to purchase under the mortgage, the latter agreeing, in consideration thereof, to pay off the judgments: *Held*, a promise upon sufficient consideration, on which, after a failure to comply with it, the mortgagor might maintain an action.

An express promise to one having a personal interest in it, entitles him to sue



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in his own name for a breach, though the circumstances are such that its performance must have enured chiefly to the benefit of others.

ASSUMPSIT, tried before GRIDLEY, C. Judge, at the Oswego circuit, in June, 1839. The case, as it stood upon the evidence given, and the evidence offered by the defendant and rejected by the judge, was this: The plaintiff owned two pieces of land in the county of Oswego, and on the 27th of April, 1830, mortgaged the same to *Richard Varick*, to secure the payment of \$1000, with interest. On the 14th October, 1833, he mortgaged the same premises to *Rudolph Bunner*—the amount of this mortgage not appearing. On the 11th July, 1834, *Mather & Marvin* recovered two judgments against the plaintiff, amounting to \$828.07, which were liens on the same premises. In July, 1835, the second, or *Bunner* mortgage, was foreclosed by advertisement and sale under the statute, and the premises were purchased by *Rudolph Bunner jun.* who on the next day conveyed the property to the defendant. And in November 1835, the plaintiff released and quit-claimed all his right, title and interest in the property to the defendant.

The eldest, or *Varick* mortgage, was afterwards foreclosed in chancery, and the sale took place on the 27th September, 1836. When the property was put up by the master, the defendant first made a small bid, and the plaintiff then made a larger one. The defendant then requested some delay, and had a conversation with the plaintiff. The defendant said that if the plaintiff continued to bid, it would oblige him to run the property up and make him the trouble of raising a large sum to pay into court. The plaintiff said he wanted to have the property pay the judgments, and the parties spoke of the property as of sufficient value to pay all the incumbrances. The defendant said, that *if the plaintiff would withdraw his bid and allow the defendant to become the purchaser, he would pay any judgments which had been recovered against the plaintiff and were a lien on the property, and which would be entitled to a surplus.* The plaintiff accepted this proposition and withdrew his

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*Steele v. Babcock.*

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bid, and the defendant became the purchaser and received the master's deed. This action is brought upon the defendant's promise above mentioned, and the plaintiff claims to recover on the ground that the defendant has not paid the two judgments in favor of Mather & Marvin. The defendant insisted that the promise was void for the want of consideration. The judge overruled the objection, and the defendant excepted.

In May, 1834, the plaintiff made a voluntary assignment of his choses in action and other personal property to Grant, Morgan & Hatch, in trust for the benefit of his creditors. On the 2d September, 1836, before the chancery sale, *William F. Allen* purchased the two judgments in favor of Mather & Marvin, and took an assignment of the same in his own name, and gave his two notes for the purchase money, being half of the amount then due on the judgments. Although he took the assignment in his own name and gave his own notes, he acted as the trustee of the assignees of the plaintiff, and subsequently paid the notes out of moneys which came to his hands as the avails of the plaintiff's property which had been transferred to the assignees. On the day of the trial, Allen made a formal assignment of the judgments to the assignees, to whom they before equitably belonged. The defendant insisted, that the purchase made by Allen amounted to a payment of the judgments, and consequently that they were not liens upon the property at the time the promise was made. Overruled, and exception. He also insisted, that the promise to the plaintiff was for the benefit of the assignees, and that the action should have been brought in their names. Overruled, and exception. Verdict for the plaintiff, for the amount which Allen paid for the judgments with interest—\$558,06. The defendant now moved for a new trial on a bill of exceptions

*W. Duer*, for defendant.

*W. F. Allen & J. A. Spencer*, for plaintiff

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*By the Court, BRONSON, J.* It is quite clear that the statute foreclosure of the mortgage to Bunner did not cut off the lien of the judgments. (2 R. S. 546, § 8.) Mather & Marvin had the right to come in and redeem from the purchaser. Nor do I see how the assignment to Allen could destroy the lien. Although he consulted with the assignees and intended the purchase for their benefit, he took the assignment in his own name and gave his own notes for the purchase money. At law, he must, I think, be regarded as the owner of the judgments: and as such he stood in the place of Mather & Marvin at the time the promise was made on which the action is founded. He might have redeemed from the defendant, who had acquired the title of the purchaser under the Bunner mortgage. In other words, the judgments were still subsisting liens upon the property.

If we are at liberty to look at the case as it would be viewed in a court of equity, it will not change the result. The assignees did not intend by the purchase to extinguish the judgments. On the contrary, they took an assignment in the name of a third person for the very purpose, as we must presume, of keeping the judgments on foot. This was not injurious to the creditors whom they represented. The real estate of the plaintiff was not assigned to them, and by purchasing the judgments and causing them to be satisfied out of the real estate, they relieved the trust fund to be derived from the personal property from the burden of these two debts, and thus increased their means of satisfying the other creditors.

But whether the purchase was beneficial to the creditors or not, I think a court of equity would not declare the judgments satisfied. It may be true, as the defendant insists, that the trustees could not deal in this way with the trust fund; and then it is quite clear that they could not make a profit to themselves by the transaction. When a trustee misapplies the funds in his hands, the loss, if a loss results, will fall upon him; and if he make a profit, he must account for it to the *cestui que trust*. If the purchase of the judgments was an unauthorized use of the

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fund in the hands of the assignees, the creditors whom they represent might either have claimed the benefit of the purchase, in which case they would stand as the equitable owners of the judgments; or they might have treated it as a wrong done to them, and call on the assignees to account for the money paid for the judgments. Had the creditors taken the latter course, it would not have worked a satisfaction of the judgments, but they would have belonged to Grant, Morgan & Hatch—not as assignees, but in their own right. A court of equity would not go beyond requiring them to account for the money, and overturn their title to the property purchased with the trust fund. That would be a double punishment.

The formal legal title to the judgment at the time of the promise was in Allen. But if we regard him as a trustee, and look for the equitable title, we shall find it either in the assignees for the benefit of the plaintiff's creditors, or in the assignees in their own right; and in either case the judgments were a lien on the land at the time of the promise. If the lien continued, it follows of course that the owner of the judgments, whoever that owner may be, was entitled to the surplus money arising from the sale after satisfying prior incumbrances. The plaintiff has therefore succeeded in making out a breach of the defendant's agreement.

The next inquiry is, whether there was a sufficient consideration for the defendant's promise. And here I am not able to perceive any serious difficulty in the case. The property was of sufficient value to satisfy all the incumbrances. The plaintiff, who was personally bound by the judgments, had an interest in having them satisfied by the sale; and the defendant was willing to take the property and pay the judgments, if he could be relieved from the necessity of raising and paying the money into court. The plaintiff thereupon withdrew his bid, and permitted the defendant to become the purchaser without competition, on his undertaking to pay off the judgments. That there was a sufficient consideration for the promise I cannot doubt.

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As the plaintiff's deed to the defendant was a mere quit claim, it imposed no obligation on the plaintiff to pay off the judgments for the defendant's benefit. The defendant took the land subject to the lien of the judgments. And although the plaintiff had parted with the equity of redemption, yet as the judgments were a personal charge, he had an interest in having them satisfied. He had the same right as any one else to bid at the sale under the Varick mortgage, and if he had become the purchaser and thus satisfied the judgments, he would have obtained an equivalent in the title to the land, and the defendant would have lost all that he acquired by the sale under the Bunner mortgage. The plaintiff relinquished his right to purchase, on the defendant's undertaking to pay off the judgments. There was a loss or the relinquishment of a right by one party, and a benefit secured to the other; and it seems impossible to deny that there was a sufficient consideration for the promise.

Although Allen, or the trustees, or some other third person, might derive a benefit from the performance of the defendant's undertaking, yet as there was an express promise to the plaintiff, and he had a personal interest in its performance, the action was well brought in his name.

New trial denied.

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STAFFORD vs. BACON.

If a debtor, through a wilful misrepresentation or suppression of material facts in respect to the state of his affairs, induces his creditor to accept the note of a third person for part of the demand, in full payment and discharge of the whole, the accord and satisfaction are void; and even the creditor's release, obtained under such circumstances, may be set aside in equity.

Where a debt has been discharged by accord and satisfaction for less than its amount, there remains no such moral obligation to pay the balance as will support a subsequent promise to that effect.

Otherwise, of a discharge which is not the mere *act of the party*, but by *operation of law*: e. g. an insolvent discharge.

When the plaintiff relies on a subsequent promise to pay a debt previously

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discharged, he must declare upon or reply it specially ; and cannot avail himself of it under general pleadings.

Even though a new trial is moved for upon *a case*, the grounds assumed on the argument should, in general, appear to have been distinctly mentioned to the judge at the trial.

A mere casual expression *to a stranger* of one's intent to pay a debt discharged by operation of law, cannot be made available as a new promise to the creditor.

Otherwise, *semble*, where it is intended by the debtor that a promise by him to a stranger should be communicated to the creditor ; for the latter may then adopt the act of the stranger receiving it, and thus make him an agent.

*Quere*, whether, the promise being to the son of the creditor, the jury may presume from this that the debtor intended it for the creditor.

ASSUMPSIT, tried at the Albany circuit, June 17th, 1839, before CUSHMAN, C. Judge. The declaration was general, for goods sold and delivered, money paid, &c. lent and advanced, &c. and money had and received, together with a count upon an account stated. Plea, *non-assumpsit*, with notice of an accord and satisfaction.

The plaintiff proved an account for goods sold to the defendant, which, together with interest, and over and above some credits, amounted to rising of \$2479,19 on the 26th of May, 1829. On that day, as appeared by a cross-examination of the plaintiff's witnesses, the defendant having represented himself as in failing circumstances, and unable to pay more than six shillings and eight pence on the pound, a compromise was accordingly concluded between the parties, and the note of H. Horton & Co. for the proportion mentioned was received by the plaintiff in satisfaction and discharge of his whole demand. The evidence of the compromise was in writing, and the papers, including the plaintiff's receipt, were produced and read in evidence.

The plaintiff insisted at the trial, that the compromise was procured by fraudulent representations on the part of the defendant, in respect to the then state of his affairs ; and considerable evidence was addressed to the jury on that question by both parties.

The plaintiff also relied on a promise by the defendant, made subsequent to the compromise. Job Stafford, the plaintiff's son, was the only witness who spoke to this part of the case. He testified. that, in 1825, he was a clerk of

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the plaintiff; that he knew of the compromise in 1829; that after the compromise, he and the defendant had a conversation in which the latter told the witness, the plaintiff had acted very handsomely with him (the defendant) in settling the demand in question; and he would pay the plaintiff the balance of the demand when he was able. Evidence was given tending to show that at the time of the commencement of this suit, and before, the defendant was of sufficient ability to pay such balance.

On the plaintiff resting, the defendant's counsel moved for a nonsuit, specifying the following among other grounds, viz: that the evidence relating to the promise of the defendant and his subsequent ability to pay, was inadmissible under the state of the pleadings, and should therefore be stricken from the case or disregarded; and that there was no evidence for which the defendant ought to be put upon his defence on the ground of a subsequent promise. Also, that there was no sufficient evidence of the compromise having been fraudulently obtained, to put the defendant on his defence as to that part of the case.

The several points thus made were each overruled, and the motion for a nonsuit denied; whereupon the defendant's counsel excepted.

After the testimony was closed on both sides, the defendant's counsel insisted to the court and jury, that the defendant was entitled to a verdict for each and all the reasons mentioned in his application for a nonsuit; that the conversation sworn to by Job Stafford was not in law a valid or binding contract, or promise; that evidence to establish a subsequent promise was inadmissible under the pleadings; and that there was no sufficient evidence of the alleged fraud in obtaining the compromise.

The circuit judge charged the jury, that if, from the evidence, they believed the alleged compromise was obtained by the defendant's fraud; or if they were satisfied by the proof that the defendant, after the compromise, promised to pay the balance when he was able, and that at the time this suit was commenced he was thus able, then, in either case, they should find for the plaintiff.

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The jury having found a verdict for the plaintiff, the defendant now moved for a new trial on a case.

*A. Taber*, for the defendant.

*J. Lansing & M. T. Reynolds*, for the plaintiff.

*By the Court*, COWEN, J. No dispute exists on the original account. The question of fraud in procuring the compromise was properly submitted to the jury; and were this the only point, their finding would not be disturbed. The duty of a debtor who comes for a discharge on part payment, is clear. If he wilfully misrepresent or suppress any material fact in the statement of his affairs, the accord and satisfaction are void; and even a sealed release would be set aside in equity. The cases on this point are cited in *Carter v. Connell*. (1 *Whart.* 392,) and the rule well expressed by Sergeant, J. at p. 397.

But, fraud out of the way, there is no doubt the original debt was discharged by the compromise and payment of six shillings and eight pence on the pound. The note of H. Horton & Co. was received expressly in satisfaction.

The answer set up by the plaintiff was, that the defendant had subsequently promised to pay when he was able.

This is resisted: 1. On the ground that the special promise was neither declared on nor replied; and 2. That it was void, for want of consideration.

The only ground on which the plaintiff could make the promise available, was the moral obligation to pay a debt clearly extinguished; and the point of pleading was entirely settled by this court in *Depuy v. Swart*, (3 *Wend.* 135.) There, the defendant had been discharged under the two-third insolvent act. The plaintiff sued on a negotiable note given previous to the discharge, alleging also a new and absolute promise to the payee, who sold the note to the plaintiff. This court held that it was discharged; that the subsequent promise made a new contract on which the payee must declare special'y or reply the new prom-



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ise. The same thing was repeated in *Moore v. Viele*, (4 Wend. 420,) and *Wait v. Morris*, (6 id. 394.) *A fortiori*, when the promise is conditional. *Penn v. Bennet*, (4 Camp. 205,) is also in point. The plaintiff declared for goods sold, &c.; defence, a certificate under the bankrupt act; answer, a new promise. Lord Ellenborough told the jury expressly, that if they thought the new promise was conditional, the plaintiff could not recover, because he had not declared specially. *Wait v. Morris* was the case of a conditional promise, after an insolvent discharge. The plaintiff replied a subsequent ratification of the promises declared on, but omitted to state the condition; nor indeed, perhaps, was even an absolute promise replied in due form. This court held a replication at least, essential; and granted a new trial with leave to amend.

I need not stop to show, that an accord and satisfaction is a still stronger case for the defendant. It is a conventional discharge, the same as a release or actual payment of the whole.

In the case at bar the point was distinctly made, that evidence of the subsequent promise was inadmissible under the pleadings. And yet the charge was, that a promise to pay on becoming able, and actual ability, would entitle the plaintiff to a verdict. Nearly the same point had been previously made on the motion to nonsuit.

The abstract question, whether moral obligation be predicable of a debt discharged by accord and satisfaction, does not seem to have been raised very distinctly at the trial. The point on the motion for a nonsuit was, "There is no evidence for which the defendant ought to be put upon his defence on the ground of a subsequent promise." And again, after the close of the evidence—"the conversation sworn to by Job Stafford, was not in law a valid or binding contract or promise." Job Stafford appears to be the only witness who spoke to the promise. A motion was also made in the course of the trial to strike out that part of his testimony. The particular ground, viz. that the debt had been discharged, was not mentioned; and the alleged

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promise is now assailed for three reasons besides that, viz. 1. as varying the terms of the written compromise; 2. as being *nudum pactum*; 3. as not made either to the plaintiff or his agent. Strictly, all these grounds should have been mentioned at the trial. They would then have been distinctly seen, perhaps allowed, and the plaintiff's counsel or the judge being made aware of the defects, farther evidence might have been given on that or on other branches of the case. All the four points now made, are, however, included in the general objection; and, as I am of opinion that there must be a new trial on another ground, and the points were discussed on the argument, it may be useful to examine and dispose of them.

The first objection is obviously without any foundation in fact. The promise, so far from varying the terms of the written compromise, assumed its existence, and stipulated to pay the balance. The second—that the promise was *nudum pactum*—is nearly identical with the objection that no moral obligation remained. That it was made neither to the plaintiff nor his agent is, I think, a fatal objection. A mere casual expression of intention to pay, made to a stranger after a man has been discharged, as an insolvent for instance, would clearly be unavailable in favor of the creditor. (*Moore v. Viele*, 4 Wend. 420, 422.) In this case, it is said, if made to a third person it may be good. There is no doubt of that; for it may be intended that it should be reported to the creditor; and he might, in such case, adopt the act of the stranger in receiving it, thus making him his agent. It is insisted that Job Stafford was clerk to the plaintiff, and in that sense his agent. But I cannot find proof that he was so when the promise was made, though there is evidence that he had been before, in 1825. Several years, however, had elapsed between that time and the period of the promise. His being a son of the plaintiff was, it may be, a circumstance with the jury that the defendant intended his promise for the plaintiff, who, therefore, had a right to adopt it. The promise was for his benefit; and he bringing his action upon it may, perhaps, by

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this act, have connected himself with it. Should the objection be made on the new trial, there is by no means an impossibility that it may be answered. But the law has stood ever since *Weeks v. Tybald*, (*Noy's Rep.* 11,) that the communication of an intent to pay, made to a mere stranger, and not connected with the plaintiff by any matter before or after, is void. (*Vid. Cole v. Cottingham*, 8 *Carr. & Payne*, 75.)

Whether after the debt was discharged by an accord and satisfaction, there remained any moral obligation to pay the balance, will perhaps form the decisive question, at least in one branch of the cause. I think there did not. The strongest case for the plaintiff is that of an insolvent discharge under the two-third act, on the petition of the plaintiff. There it is held, enough remains to sustain a new promise. (*McNair v. Gilbert*, 3 *Wend.* 344.) But this is a discharge by provision of positive law. Chitty says that "in all the cases in which a moral obligation has been deemed a sufficient consideration for the defendant's express promise, &c. nothing but the provision of some positive law had interposed to preclude a legal remedy, &c. until the defendant expressly promised." (*Chit. on Contr.* 12, 13, *Phil. ed.* of 1834.) It is not necessary to go over the cases. Many are collected in a note to *Edwards v. Davis*, (16 *John. Rep.* 283, 4,) in support of the proposition thus limited; and it had been before the publication of 16 *John.* adopted in substance by Spencer, J., in *Smith v. Ware*, (13 *John. Rep.* 257, 259.) The propriety, indeed the necessity of such a limitation, is shown by Daggett, J. in *Cook v. Bradley*, (7 *Conn. Rep.* 57;) and he also contends, on a very full consideration of the cases down to 1828, that we are bound to it by legal authority. (*Vid. also Mills v. Wyman*, 3 *Pick.* 207, and *Eastwood v. Kenyon*, 3 *Perry & Dav.* 276.)

In the case at bar, the plaintiff had accepted the commercial paper of a third person, expressly in satisfaction; and there seems also to have been a general compromise with creditors, in which he participated. He himself had

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virtually promised the defendant and the other creditors to consider the debt discharged. The moral obligation lies much on his side. I speak not of the alleged fraud in obtaining the receipt. If that exist, no doubt the defendant is liable; and had that alone been put to the jury, I could have felt no difficulty. There were circumstances of suspicion which called for explanation. But looking at the form in which the case was put to the jury, they may have based themselves entirely on the promise and supposed moral obligation of the defendant. The case is the same in legal effect as if the debt had been released under seal, or paid in full.

When a debtor is voluntarily and fairly discharged by his creditors, it must be left to his option whether he will pay. Being an honest man and becoming able, payment would be a thing of course; but that is a matter of mere imperfect obligation which the law can not act upon without going wide of its office, and, indeed, dismissing the rule which calls for a valuable consideration in any case. In one sense, a man is always under a moral obligation to fulfil a fair promise whether made on a consideration or not; for instance, a promise of charity to a stranger. It would follow from the proposition in question as it is sometimes put, that, in the case supposed, a second promise might be sued upon, and the charity enforced by execution.(a)

I am aware that the conclusion to which I have arrived is opposed by the decision in *Willing v. Peters*, (12 Serg. & Rawle, 177,) decided in 1824. That case was the same as the one before us. The court held the promise binding, and likened it to a promise by an insolvent discharged under the two-third act. That case, however, was questioned in the very court which decided it, and I think overturned, by the late case of *Snevily v. Reed*, (9 Watts, 396, 401, A. D. 1840.) The plaintiff had discharged the body of the

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(a) A merely moral or conscientious obligation, unconnected with any prior legal or equitable claim, will not support a promise. (*Ehle v. Judson*, 24 Wend. 97. 99, *per Bronson, J.*)

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**Morris v. Keyes.**

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defendant from custody under a *ca. sa.*, and he afterwards promised to pay the debt. Held, that no moral obligation remained, sufficient to sustain the promise.

My opinion is, that a new trial should be granted, the costs to abide the event.

New trial ordered.

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**MORRIS vs. KEYES.**

An exemplification of the record of a *will* merely, without the proofs, cannot be received in evidence. The whole record (including the proofs) must be certified.

A transcript of the record of a deed, without a transcript of the certificate of probate or acknowledgment, is not evidence.

Neither the record of a deed or will is more than *prima facie* evidence of the authenticity of the original.

To show a fine levied under the act of 1787, the original record of the proceedings in this court, or an authenticated copy thereof, must be resorted to.

**EJECTMENT** for lands in St. Lawrence county, tried before WILLARD, C. Judge, at the St. Lawrence circuit.(a)

The will of Gouverneur Morris, (the plaintiff's father,) was a necessary link in the plaintiff's chain of title. He offered in evidence the exemplification of a record in the supreme court as follows: "The people, &c. to all to whom, &c. Know ye, that we, having inspected the books for recording wills in our supreme court of judicature for our said state, do find the will of Gouverneur Morris, and codicil thereto added, recorded and remaining of record (after having been first duly proved in open court,) in the words and figures following, to wit:"—then followed what purported to be a copy of the will, dated October 26, 1816, and also of the codicil dated October 28, 1816: "All which we have caused to be exemplified, and the seal of

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(a) The papers furnished on the argument did not show the day, year, or place of trial, or the quantity of land claimed; neither did they show where the land was situated.

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our supreme court to be hereunto affixed. Witness John Savage, Chief Justice of our said supreme court, at the city of New-York, the seventeenth day of September, in the fifty-third year of our independence. (Signed) Jas. Fairlie, clerk." The defendant objected to this evidence, because the exemplification neither stated the time nor the manner of the proof of the will. The judge overruled the objection, and the defendant excepted.

After the plaintiff rested, the defendant, for the purpose of showing a fine levied between Philip Kearney and Archibald K. Kearney of the lands in question in October term, 1811, offered in evidence the record of *the foot* of the fine, with proclamations indorsed, from the clerk's office of St. Lawrence county; but he offered no other evidence of the proceedings in this court on levying the fine. The judge rejected the evidence, and the defendant excepted. Verdict for the plaintiff. The defendant now moved for a new trial on a bill of exceptions.

*R. H. Gillett*, for the defendant.

*John Clark*, for the plaintiff.

*By the Court*, BRONSON, J. It does not appear when the will of Gouverneur Morris was proved; but it must have been at or before the date of the exemplification in September, 1828. The time of proving should, I think, have been stated; but, what is much more important, the proofs should have been exemplified with the will. Under the act of 1813, the witnesses are to be examined in open court, and the examinations and proofs are to be reduced to writing; and if it appear that the will was duly executed, "the court shall order their clerk to record the same will, *together with the proof so taken*, in a book;" and every will "proved *in manner aforesaid*," and also "*the record* of such will, and *the transcript of such record*, certified by the clerk, and sealed with the seal of the court, shall be as effectual in all cases as the original will would

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be if produced and proved." (1 *R. L.* 365, § 6.) "The record" includes the proofs as well as the will—both are to be recorded together: and "the transcript of such record," must mean *the whole* of the record. When the original record is produced in evidence, it will of course show the proofs as well as the will; and the transcript or exemplification should in like manner extend to both. The language of this statute is in some respects very much like that relating to the recording of deeds. A deed duly proved or acknowledged may be recorded—the proof or acknowledgment being recorded with it; and the record of the deed, or a transcript of such record, is declared to be evidence. Under this statute it has, I think, never been doubted, that the certificate of proof or acknowledgment must be exemplified with the deed. In other words, the transcript must contain the whole record.(b)

The record of a will, like that of a deed,(c) is only *prima facie* evidence of its authenticity, and may be repelled by contrary proof. (*Jackson v. Rumsey*, 3 *John. Cas.* 234.) This principle has since been sanctioned by the legislature. (2 *R. S.* 58, § 15.) The heir or other person wishing to contest the validity of the will, can only have the full benefit of this rule by requiring the proofs on which the will was recorded to be produced, to the end that the jury may weigh and compare this evidence with the other evidence to be produced on the trial; and as the person setting up

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(b) And, in general, where a copy of any record is made legal evidence, the whole must be certified; mere *extracts* will not be received. The authentication of the copy moreover, whether it be by a certificate merely, or a technical *inspeimus* or exemplification, should import that it is a copy of the whole. For several cases relating to this doctrine, and its exceptions, together with the construction of particular certificates, &c. see *Cowen & Hill's Notes to 1 Phil. Ev.* 1050 to 1061.

In this state we have a statute relating to the form of these and the like certificates, requiring, among other things, that the certificate should expressly state that the copy is a copy of the *whole*, &c. (2 *R. S.* 403, § 59.)

(c) See *Cowen & Hill's Notes to 1 Phil. Ev.* 1249, and the cases there cited also 1 *R. S.* 759, § 17.

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the will claims the benefit of the record evidence, the burden producing it should lie upon him.

The fine set up by the defendant was levied under the act of 1787, which required that all of the proceedings should be "inrolled in rolls of parchment, to be of record forever, and to remain in the safe custody of the clerk of the supreme court, and his successors." The original writ, with the return thereof, the warrants of attorney, if any, the license to agree, and the concord of the fine, were to be "inrolled upon one and the same roll;" and the writs of *dedimus potestatem*, if any, with the returns thereof, and the note and *the foot* of the fine, were to be "inrolled upon separate rolls." (1 K. & R. 73, § 7.) The *counterpart* of the foot of the fine to be delivered to the party, was to be recorded by the clerk of the county in which the lands were situate, within one year after the engrossing of the fine; and this was to be done "for the more easy discovery of fines and the security of purchasers." (§ 7.) It is quite evident from these provisions, that the original enrolments or records of the fine, including *the foot* as well as the other parts of it, are in this court, and should have been proved by producing the originals or duly authenticated copies from the clerk of this court. It was proper to show that the counterpart of the foot of the fine had been recorded in St. Lawrence; but the proof of that fact could not supersede the necessity of resorting to the higher and better evidence in this court of the levying of the fine.

The evidence offered by the defendant to prove a fine levied was insufficient: but on the other ground the verdict must be set aside.

New trial granted.



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Kinney v. Showdy.

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KINNEY vs. SHOWDY.

An officer selling property at public vendue, is not bound to receive the bid of an infant : and therefore, on a sale under a tax warrant by a school district collector, where an infant bid a certain sum for the property, and the officer, without regarding his bid, struck it off to another for less ; *held*, that he was not liable to an action for the difference between the bids.

ON error from the Onondaga C. P. Action on the case by Kinney, before a justice, against Showdy, a school district collector, for selling the plaintiff's cow on a tax warrant for \$16,12½, when \$25 was bid for the cow. The \$25 was bid by the plaintiff's son, who was an infant under twenty-one years of age, and the officer refused to receive the bid, and struck off the property to the next highest bidder. The justice refused to nonsuit the plaintiff, and the jury found a verdict in his favor for 8,87½, the difference between the two bids. The C. P. *reversed* the judgment, on the ground that there should have been a nonsuit. Kinney, therefore, brought this writ of error.

*J. R. Lawrence*, for plaintiff in error.

*H. Worden*, for defendant in error.

*By the Court*, BRONSON, J. The infant was not capable of making a binding contract for the purchase of the cow, and I think the officer was not obliged to receive his bid. True, the property might be put up again and re-sold if the infant refused to accept and pay for it ; but the officer was not bound to strike off the property on an offer which, if accepted, would not make a valid contract. The court of C. P. was right in reversing the judgment.

Judgment affirmed.

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Martin v. The Mayor, &c. of Brooklyn.

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MARTIN vs. THE MAYOR, &c. OF BROOKLYN.

The board of trustees of the village of Brooklyn under the act of *April 3d, 1827*, had a discretionary power to go on or not, in the matter of laying out streets, until the final confirmation of the commissioners' report of damages; and *held*, that a party in whose favor the report was made could have no action either against the trustees, or the corporation of the city of Brooklyn as their successors, for neglecting to file the report, even though he had sustained special damages.

In general, where a duty is imposed upon officers by statute, whether by words peremptory in themselves, or merely permissive, they have no discretion to refuse its performance as against a party having an absolute interest in it.

A contract by officers authorized to lay out streets, with an individual in whose favor a report for damages has been signed but not confirmed, purporting to bind the former to do certain acts, in consideration that the latter will waive his rights under the report, is *nudum pactum*.

And *semble*, a contract on the part of such officers, importing a surrender of their right to discontinue the proceeding before confirmation of the report, is contrary to public policy, and void; they having no power to part with their discretion in this particular.

A count in case for a *tort*, cannot be joined with one upon *contract*.

A municipal corporation is not liable for the misfeasance or nonfeasance of one of its officers, in respect to a duty specifically imposed by statute on *the officer*.

Otherwise, if the duty is one imposed absolutely on *the corporation*, as such.

The postmaster general is not liable for the nonfeasance of a deputy postmaster, though the latter holds by appointment from the former.

DEMURRER to declaration. The action was case, against the defendants as successors of the President and Trustees of the Village (now city) of Brooklyn. The liability is claimed to have devolved on the present defendants, in virtue of *Sess. Laws of 1834, p. 115, 116, § 71*.

There were two counts in the declaration; the first stating, in substance, that while Brooklyn was a village, the president and trustees instituted proceedings for the purpose of laying out certain streets, and went on to an assessment of damages pursuant to the statute. (*Sess. Laws of 1827, p. 135, § 18*.) That, among others, a sum in damages was awarded to the plaintiff, for his land proposed to be

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taken; the commissioners of estimate, &c. reporting to the trustees. That the proper notices were given and published. But though no appeal was interposed, they had wilfully omitted the duty enjoined by the statute of causing the report to be filed with the clerk of the common pleas of Kings county so that it could be confirmed. The count set out special damages which the plaintiff had sustained by the delay. That, he gave notice to the trustees of his willingness to have the streets worked, and requested them to proceed. But, intending to injure the plaintiff, they refused to cause the report to be filed, &c.

The second count was substantially like the first, with the added facts in the second, that the board of directors, after the assessment was returned, resolved that it was expedient to open the streets, provided the parties interested would waive the first reports, the filing of the same, and the appointment of the commissioners; and that a committee of six trustees should be appointed to treat and agree with the owners of ground required for the streets; that the plaintiff consented to such waiver in writing, was willing &c. and gave notice, &c.; but the trustees refused to proceed in the fulfilment of the agreement. Special damages were alleged as arising from the breach of this agreement.

The defendants demurred generally to both counts; and the plaintiff joined in demurrer.

*W. A. Greene*, for defendants.

*J. Greenwood*, for plaintiff.

*By the Court*, COWEN, J. As to the first count: If, as is supposed by the plaintiff's counsel, the duty of the trustees to file the report was absolute; if they had no discretion, but their duty was ministerial, then indeed there is a good deal of plausibility in this action. The plaintiff shews a neglect on their part, which was with intent to injure him, and which has had that effect. All this is admit-

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ted by the demurrer. But the question of duty was examined by the late chief justice, in *The People*, on the relation of this plaintiff, *vs.* The President and Trustees of the then village of Brooklyn, and he inclined strongly that the trustees had a discretion to go on or not, until the final act of confirmation by the common pleas. I lately held, also, in respect to street proceedings in the city of New-York, that the corporation there had such discretion till the final confirmation by this court. I am strongly inclined to think there is no substantial difference in the two cases. In both, the officers of the corporation had a public duty to discharge. And in general, where such a duty is imposed by statute, whether by words peremptory in themselves, as here, or merely permissive, as in the case of New-York, they have no discretion to refuse its performance as against a party having an interest in such performance. (*Malcom v. Rogers*, 5 Cowen, 188, 193, 4, and the cases there cited. *Holroyd, J. in Bolton v. Crowther*, 4 Dowl. & Ryl. 197. *Rex v. Mayor, &c. of Hastings*, 1 id. 148. *Rex v. Eye*, 2 id. 172, 176, and note.) It will be seen by these cases, however, I apprehend, that whatever the words of the statute may be, we must look to the party for whose benefit the proceeding is to be had. In the case at bar, for instance, the statute says that, if there be no appeal, the trustees *shall* cause the report to be filed at the next term, and the common pleas shall, by order, confirm it. For whose benefit is this? Clearly for that of the public, more immediately for the benefit of that portion of the public who were residents of the village of Brooklyn. Neither make any complaint that nothing was done. In that respect, so far as the public interest and public duty of the trustees were in question, every thing is right. Did they owe any public duty, as officers, to the plaintiff? Can he complain that they have omitted to lay out streets which the public do not want? This court have already refused to put the trustees in motion, on his application for a mandamus, strongly intimating that his rights were not absolute till confirmation. As an individual, he can have no interest ex

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cept in obtaining payment for his land; and he accordingly complains that the trustees would not put the corporation in such a position that he could compel them to pay. They say: "We prefer, for reasons satisfactory to ourselves, to stay proceedings, at least for the present." It is the same thing to the plaintiff. He does not, to be sure, get the money for the land: but he holds an equivalent, the land itself. He is deprived of nothing in this respect, and can have no such interest as to give the statute a mandatory operation in his favor as a mere individual.

But he complains that a cloud has been brought over his title, that he has been prevented from raising money on his land, and incurred other disadvantages by the delay. Truly, as the plaintiff's counsel said, the action is one of the first impression, at least in this respect. He avers, that on the faith of the proceedings being consummated, he had pulled down his rope-walks and stone building on the land, and built in another place; that he has erected three new buildings in reference to one of the contemplated streets; and that the opening of the streets would have benefitted his other lands, &c. The speculative disadvantage arising from such proceedings being kept pending for a long time may be considerable; but we cannot recognize them as the subject of an action against the officers commissioned to prosecute such proceedings, or the corporation which they represent. In the nature of things, such officers must exercise a discretion on the question whether the public shall be finally committed; and courts must hold such consequences as are here complained of to be *damnum absque injuria*. A contrary rule would be ruinous to all those who engage as commissioners in carrying through this sort of improvement. It is said, the trustees should at least have decided one way or the other, within a reasonable time. Such is, no doubt, the duty of every officer who is required by law to decide. But can an action be brought by a party for unreasonable delay, when the officer has a discretion to decide one way or the other? and that too in respect to a public improvement, the complainant having no individual

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right demand that the officer shall decide one way or the other? I think not.

As to the second count, I do not perceive that it adds any thing material to the ground of action in the first. It states that the plaintiff agreed to waive all his rights under the proceedings, including the appointment of commissioners, and their assessment; in consideration of which the trustees agreed to raise a committee to treat with him as to the damages, they having finally resolved to go on with the streets under this new arrangement. But though requested, they refused even to raise the committee. If by this count it be intended to claim for the violation of a contract, it is improperly joined with the first count, which is in case for a tort. Beside, as the plaintiff waived no perfect right—nothing more, as we have seen, than the corporation had a right to insist on—there was no consideration for the promise. But independently of this, the whole was no more than the waiving of what I suppose the trustees thought to be an extravagant assessment, and an agreement to attempt another mode of ascertaining the plaintiff's claim, should the streets be finally laid out. Certainly, it added nothing to the general obligation to the trustees. They might, as before, still refuse to go forward, on the ground of the improvement being injurious or unprofitable to the public. In this respect I think that they enjoyed a discretion which individuals have no power, as such to control; and the trustees no power to part with. To allow that commissioners of streets and highways may bind themselves by contract to subserve the interests of individuals, would be a clear violation of public policy. They are officers of municipal corporations or *quasi* corporations, and in respect to the laying out of streets and highways are primarily bound to consult the interests of the community at large. Individuals can acquire no rights under their proceedings except in a certain form, and at a fixed stage; and then their rights must be enforced, not against the commissioners, but the community which they represent.

I am of opinion, therefore, that if the injury complained

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of by the plaintiff were imputable to the village as a corporate act, to the liability for which, if any, the city would succeed, this action is not sustainable. The plaintiff was bound to await the confirmation. But even if a right vested independently of that, an action on the case for a tort would not be the proper remedy. If the award of damages be absolutely due, the trustees have done their duty to the plaintiff, on this showing. A perfect right would compromit the corporation as such, and the liability would devolve upon the city within its act of incorporation. (*Sess. L. of 1834, p. 115, § 71.*) The complaint of the plaintiff is, that the trustees stopped short of fixing such a liability as a debt.

But admitting that the trustees for the time being were guilty of a non-feasance, for which the plaintiff could have maintained an action; was it a corporate injury? If not, the city are not liable under the 71st section. The words are, "All debts, charges, claims and responsibilities, for which the village of Brooklyn may be now made liable, except, &c., shall be paid by the owners of lands and inhabitants within the fire and watch district of the city of Brooklyn." Admitting that a remedy by action will hold at all against the city for debts of the village, and waiving the doubt whether the remedy can be enforced otherwise than by taxation on the particular section, it is, I apprehend, impossible to maintain that a village corporation is liable for a wrong committed by any of its officers. It is a political body, bound, I admit, and liable to an action, when incurring a debt through its corporate officers acting within the line of their duty; but not for either a non-feasance or misfeasance committed by independent corporate officers. I speak not of banks or other private corporations; nor of turnpike companies, who are certainly liable for their agents' omission to keep their road in repair. I concede the liability also of municipal corporations for like omissions, where the duty of repair or the like is absolute and due from them as a corporation. (*Mayor of Linn v. Turner, Coucp. 86.*) Such, for aught I know, would attach to our cities and in-

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corporated villages in respect to non-repair of streets. But no case has been cited wherein it has been holden, that municipal corporations are liable for omissions of a duty specifically imposed by statute on one of their officers. In this respect the latter are *quasi* civil officers of the government, though appointed by the corporation. The relation of master and servant does not exist between the corporation and officers; certainly not so nearly as that between a postmaster general and his deputy; and yet the former is held not liable for the non-feasance of the latter, though he hold by the appointment of the former. (*Lane v. Cotton*, 1 *Salk.* 17.) The ground on which Holt, C. J. dissented in the case cited was, that the deputy might be displaced at the pleasure of the principal.<sup>(a)</sup> Here the trustees cannot be removed at the pleasure of the corporation; and in regard to streets, they are to obey the statute, like town commissioners. Several cases were cited on the argument wherein it was held that such officers are liable personally, but none that the corporation who elect them is liable as such. You may as well make a town liable for the non-feasance of commissioners of highways in stopping or delaying proceedings to lay out a new road.

In any view, it appears to me this declaration is ill, and there must be judgment for the defendants.

Judgment for defendants.

(a) See, as to the liability of public officers for the acts of their subordinates *Story on Agency*, 320, 1, 327 to 333 : *Story on Bail* 300 to 302



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Say v. Dascomb.

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SAY vs. DASCOMB.

In a suit by an assignee of a note not negotiable, brought against the maker in the payee's name, the defendant, under pleas of payment and of a set-off, gave in evidence a receipt in full as to the note, and also a note against the payee. *Held*, that the plaintiff, under general replications denying these pleas, could not prove the defendant's receipt and note to have been obtained by him after he had been duly notified of the transfer of the demand sued on; but to render these facts available, the replication should have been special.

If the defence of payment had arisen *before* the transfer of the note sued on, and the assignee had taken it on the faith of the defendant's representation that it was good, he would have been estopped from setting up the payment; and in such case, *semble*, the facts constituting the estoppel might be shewn under the general replication.

MOTION to set aside the report of a referee. *Declaration* in assumpsit—common money counts—with the copy of a note annexed. *Pleas*, 1. non-assumpsit; 2. payment, and 3. set-off—all in the usual form. *Replications* denying payment and set-off, in the usual form. The plaintiff gave in evidence a promissory note, not negotiable, dated September 25, 1838, by which the defendant promised to pay the plaintiff \$100, six months after date.

The defendant thereupon gave in evidence the plaintiff's receipt dated the 26th Sept. 1838, by which he acknowledged the payment of \$100 in full of the note. He also gave in evidence, as a set-off, a note made by the plaintiff on the 15th Sept. 1838, for \$200—payable to G. G. or bearer on the first of February, then next, with interest.

The plaintiff then offered to prove that on the 26th of September, 1838, one *De Witt Cuddeback* agreed to sell the plaintiff a horse for the sum of \$100, to be paid for in the defendant's note on which the action was brought, provided he ascertained the note was good: that *Cuddeback* thereupon went to the defendant with the note, informed him of the bargain, and inquired if the note was good, to which the defendant replied that the note would be good to *Cuddeback* if the plaintiff would sign it over: that the

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bargain was thereupon concluded, and the plaintiff signed over the note to Cuddeback, who, on the same 26th September, 1838, gave the defendant notice of the assignment. The plaintiff further offered to prove that Cuddeback afterwards assigned the defendant's note to *J. M. Church*, and that this action was brought for his benefit in the plaintiff's name. The defendant objected that this evidence was inadmissible under the pleadings, and it was rejected by the referee.

The plaintiff also offered to prove, that the defendant purchased the \$200 note, which he proposed to set off, after the defendant's note had been assigned to Cuddeback and the defendant had had notice of the assignment. This evidence was also rejected, and the referee reported in favor of the defendant for the amount due on the note offered as a set off.

*J. R. Lawrence*, for the plaintiff, now moved to set aside the report.

*F. G. Jewett*, for the defendant.

*By the Court*, BRONSON, J. On the facts offered to be proved there can be no doubt that the defendant is bound to pay the note on which the action is brought, either to Cuddeback, the first assignee, or to Church, the present holder: and that while necessarily suing in the plaintiff's name, they should be protected against his acts done after notice to the defendant of the assignment. So also they should be protected against a set-off of the plaintiff's note, which the defendant purchased after notice of the assignment.

But there is a difficulty upon the pleadings. The plaintiff, instead of taking issue on the plea of payment, should have replied the assignment and notice; and there should have been a like replication to the plea of set-off, instead of a general denial of the matters alleged in the plea. I am not aware that this point has been directly adjudged; but in all the cases I have noticed, when a defence as

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against the nominal plaintiff has been pleaded, the replication has been special, setting up the assignment and notice. In *Littlefield v. Storey*, (3 John. R. 425,) one of the pleas was *payment*. In *Raymond v. Squire*, (11 John. R. 47,) a *release* was pleaded; also, an *accord and satisfaction*. In *Dawson v. Coles*, (16 John. R. 51,) there were pleas of *payment*, *release*, and a *former suit and recovery* by the plaintiff. In *Briggs v. Dorr*, (19 John. R. 95,) a *release* was pleaded; and there was a like plea in *Wheeler v. Wheeler*, (9 Cowen, 34:) and in *Wheeler v. Raymond*, (5 Cowen, 231,) *satisfaction* was pleaded. In each of these cases the replication was special, stating an assignment and notice before the defence set up by the plea arose, and averring that the action was brought in the name of the nominal plaintiff for the benefit of the assignee.

This should be so upon principle. When the plaintiff cannot gainsay the plea, he should confess and avoid it. In this way the defendant will have an opportunity to answer the matter on which the plaintiff intends to rely, and an issue will be formed upon the very point in dispute between the parties. To this point the proofs must be confined on the trial. It is an elementary principle, that no evidence is admissible which does not tend either to prove or disprove the issue which has been joined between the parties. This rule admits of very few exceptions, none of which touch the present case. The issues to be tried here were, 1. whether the defendant made the note on which he was sued; 2. whether he had *paid* the note to the plaintiff; and 3. whether he had a *set-off* against the plaintiff. The defendant proved the two last of these issues, and the plaintiff did not offer to controvert that proof. He did not on the trial, as he did by his replications, deny either that the plaintiff had been paid, or that the defendant had a *set-off* against him; but he proposed to set up new matter, for the purpose of showing that, although the pleas were true and the replications false, the defendant ought not to avail himself of the defences which the pleas set forth. This was not within the issues upon which the parties went to trial, and the evidence was properly rejected.

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Bank of Salina v. Henry.

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If the defence of payment had arisen *before* the note was transferred, the defendant would have been estopped from setting up the payment as against the assignee, because the latter parted with his property and took the note on the faith of what the defendant had told him. (*Foster v. Newland*, 21 Wend. 91) And then, perhaps, it would not have been necessary to reply the special matter. (*Welland Canal Co. v. Hathaway*, 8 Wend. 480.) But it is unnecessary to decide that point, for I infer from the case that the payment was made, not only after Cuddeback had made enquiry, but after he had taken the note and given notice to the defendant. It is, then, the common case, and the plaintiff should have replied the assignment and notice, instead of denying the truth of the pleas.

COWEN, J. dissented.

Motion denied.

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BANK OF SALINA vs. HENRY, impleaded with Pierce

Though a note is prosecuted in the name of a mere nominal holder, the defendant cannot examine the *party in interest* to prove it usurious, without his consent; for the act of May 15th, 1837, (*Sess. L. 1837, p. 486, § 2,*) only gives this right as against the *plaintiff on the record*.

At common law, no one can be compelled to testify to facts showing himself guilty of a misdemeanor.

ASSUMPSIT, tried before MOSELEY, C. Judge, at the Onondaga circuit, in September, 1839. The action was on a promissory note made by the defendants, dated April 20, 1838, for \$200, payable to the plaintiffs 63 days after date. The defendants pleaded the general issue, and gave notice of the defence of usury, verifying the truth of the plea by affidavit, pursuant to the second section of the usury act of 1837. (*Stat. of 1837, p. 487, § 2.*) On the trial, the defendants called Elisha Chapman as a witness, who testified that he was, and always had been, the owner of the note, and that the Bank of Salina had no interest in it.

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Bank of Salina v. Henry.

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The defendants then proposed to prove by this witness that the note was usurious and void. The judge decided that the witness could not be compelled to testify to the usury, and the defendants excepted. Verdict for the plaintiffs.

*M. T. Reynolds*, for defendant.

*B. D. Noxon*, for plaintiffs.

*By the Court*, BRONSON, J. At the common law, Chapman, being the party in interest, was not bound to testify without his consent. (*Mauran. v. Lamb*, 7 Cowen, 174.) But a more substantial reason why he could not be compelled to answer, is, that he was called to prove himself guilty of a misdemeanor. (*Stat. of 1837*, p. 487, § 6.) It is said, however, that he was the *plaintiff* in the action, and consequently that the case was provided for by the usury act of 1837. The second section of that act is as follows: "Whenever in an action at law the defendant shall plead or give notice of the defence of usury, and shall verify the truth of his plea or notice by affidavit, he may, for the purpose of proving the usury, call and examine the plaintiff as a witness, in the same manner as other witnesses may be called and examined." The eighth section subjects the plaintiff to the pains of perjury for false swearing, when examined as a witness pursuant to the act; but provides, that his testimony shall not be used against him in a criminal prosecution.

Although Chapman was the party in interest, and would for some purposes be regarded as the real plaintiff, yet I think the case does not come within this statute. We sometimes look beyond the parties to the record—the person complaining of an injury, and the person who defends or answers the complaint—and see who stands behind them. In this way, the plaintiff in interest is sometimes required to pay the costs which may have been adjudged against the plaintiff on record; and on the other hand, he is protected against the fraudulent acts of the nominal par-

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ty. So, also, there may be a person standing behind the defendant, who for some purposes will be recognized as the real party in interest on that side of the controversy. But in the legal, as well as in the ordinary use of those terms, no one can strictly and properly be denominated either *plaintiff* or *defendant* in an action, unless he is named as such on the record. The words plaintiff and defendant in this statute are used as correlative terms—"the *defendant*" may, in certain cases, "call and examine the *plaintiff* as a witness." The legislature evidently had in mind the parties to the record, and no one else. If the provision is not broad enough, the act should be amended. The morality of this statute is very questionable, and it ought not to be extended by construction.

New trial denied.

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 VAN DUYNE, late sheriff, assignee, &c. vs. COOPE.

It is no defence to an action against sureties in a replevin bond, that they were excepted to, and failed to justify.

*Quere*, whether the complete substitution of new bail, as a consequence of the exception, would constitute a defence.

The doctrine that *special bail* may be displaced by their failure to justify after exception, has no application to the case of sureties in a replevin bond; yet, even in respect to the former, the matter cannot be interposed as a defence *by plea* to an action on the recognizance, but only operates as ground for ordering an *exoneretur*.

DEBT on a replevin bond given pursuant to 2 R. S. 431, § 7, 2d ed. The action was tried at the New-York circuit March 31st, 1841, before GRIDLEY, C. Judge. The bond was joint and several, binding the defendants as sureties for the due prosecution of a suit in replevin, (commenced by one Gray against the present plaintiff, then sheriff of King's county,) and for the return of the property, in case a return should be adjudged, &c. It was executed to one of the coroners of that county, to whom the writ was directed. The plaintiff proved the recovery of a judgment

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by him in the replevin suit, with the other requisites for establishing a breach of the condition of the bond; and also an assignment of the bond to him.

The defence relied on was, that the plaintiff in this action had, in due time and form, excepted to the sureties in the replevin suit; and that the latter had never justified, or attempted to justify. Evidence was given to establish these facts. There was some doubt, however, upon the proof, whether formal notice of the exception had been served on the coroner. The defendant's counsel insisted that the exception, with notice thereof, and a failure on the part of the sureties to justify, operated their discharge; and that even if there were a formal defect in respect to the exception, the sheriff having given notice to the plaintiff in the replevin of a regular exception, &c. was estopped from availing himself of such defect. The circuit judge being of this opinion, accordingly nonsuited the plaintiff; and the latter now moved to set aside the nonsuit and for a new trial, upon a case.

*Cleveland & Smith, for the plaintiff.*

*J. M. Van Cott, for the defendant.*

*By the Court, COWEN, J.* We think the learned judge erred in nonsuiting the plaintiff. We waive the question whether notice of the exception was given to the coroner or not; for we think that an exception entered on a replevin bond, with all the notice required by the statute, followed by the mere neglect of the sureties to justify, will not work their discharge. The doctrine that an exception against special bail, and their omission to justify, displace them as bail, has no application. Yet the effect given to this exception at the circuit, was even greater than it would be upon a bail-piece; for in that case it operates merely as ground for ordering an *exoneretur*—a ground which has, I admit, been generally treated as conclusive on motion. But even in favor of special bail, it could not be interpo-

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ed as a defence by plea against an action upon the recognizance. It is not necessary to say what effect the complete substitution of new bail might have in replevin, as a consequence of the exception. But independently of that, it is difficult to conceive of any act which would be a defence beside such as the law would recognize against any other bond containing a similar condition. This, it is well known, must be a strict compliance with the terms of the condition, unless prevented by the default of the obligee, or a release, &c.

New trial granted.

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 VAN WINKLE vs. UDALL.

A sheriff, having levied on the personal property of H., in virtue of a *fi. fa.* in favor of B., received another against H., in favor of V. Afterward, by an arrangement between B. and H., the first *fi. fa.* was withdrawn, and H. sold the property, applying the proceeds on B.'s judgment. The sheriff having neglected to proceed against the property under the second *fi. fa.*; *held*, that he was liable to V. for its value.

Where a sheriff has seized property under a *fi. fa.*, and then another *fi. fa.* against the same defendant comes to his hands, the bare receiving of the latter operates as a constructive levy under it on the property seized upon the first.

CASE against the sheriff of Kings, for official negligence, tried before EDWARDS, C. Judge, at the Kings circuit October 2d, 1839.

The proof at the trial showed the following, among other facts: Mr. Bosworth had an execution in the defendant's hands against one Hendrickson, in virtue of which a levy had been made on all Hendrickson's personal property not claimed by others. While the property was held under that levy, the plaintiff caused an execution to be issued on a judgment in his favor against Hendrickson, which execution Mr. Bosworth put into the defendant's hands. The defendant received the latter March 9th, 1838. On or about the 5th of May following, Hendrickson, with Mr. Bosworth's consent, sold the property seized under his ex-



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execution to one Pine; Pine purchasing with knowledge that there was an execution against it. The entire proceeds of this sale were received by Mr. Bosworth, and applied on his execution, and Hendrickson made him some other payments about the same time; whereupon Bosworth, on or about the 18th of May, 1838, withdrew his execution, telling the sheriff, however, that the plaintiff would expect him to go on with the execution in question. The latter was returnable on the first Monday of May, 1838. The sheriff never did any thing under it, and had suffered Pine to take and appropriate the property.

The judge charged the jury that, inasmuch as Mr. Bosworth, whose execution was levied first, consented that Hendrickson should sell the property, and apply the proceeds on his execution, the plaintiff could not recover, as he had not been damnified. He also refused to charge, that the sale of the property to Pine was subject to the plaintiff's execution. Exceptions were taken to the charge, as well as to the refusal; and a verdict having passed for the defendant, the plaintiff now moved for a new trial on a bill of exceptions.

*J. S. Bosworth*, for plaintiff.

*J. A. Lott*, for defendant.

*By the Court*, COWEN, J. The sheriff had levied on all the property in question, under the *fi. fa.* in favor of Bosworth. Then came the plaintiff's *fi. fa.*, the mere receipt of which by the sheriff operated as a constructive levy.<sup>(a)</sup> Bosworth's *fi. fa.* being subsequently withdrawn, that of the plaintiff took complete effect, the levy under it becoming absolute. Clearly, the sale to Pine was subject to the levy under the plaintiff's execution; first, the qualified levy, and secondly, the absolute one, when Bosworth's *fi. fa.*

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<sup>(a)</sup> *Cresson v. Stout*, (17 John. R. 116.) And see *Collins v. Yewens*, (10 Adol. & Ellis, 570.

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was withdrawn. Either was sufficient to hold the goods as against Hendrickson, or Pine who claimed under him.(b.) The sheriff should, therefore, have kept the goods and sold them under the plaintiff's *fi. fa.* Not having done so, he is liable for their value. The learned judge erred in omitting so to charge: and there must be a new trial.

New trial granted.

(b) See *Butler v. Maynard*, (11 Wendell, 548.) 2 R. S. 289, 290, § 17, 2d ed

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STILWELL, administrator, &c. vs. HASBROUCK, impleaded with  
WYCKOFF.

Where one of two defendants, in answer to a declaration on a joint promise of both, pleaded that *he* did not undertake and promise within six years, &c. ; *held*, good in substance, as the plea amounted in legal effect to a denial of a promise by either.

*Non assumpsit infra sex annos*, is no answer to a count on a promissory note payable at a day subsequent to its date.

A plea purporting in form to answer the whole declaration, but containing matter which legally answers only a part of it, is bad.

DEMURRER to pleas. The declaration was on promises to the plaintiff's intestate made by the defendants jointly. The first count was on a note executed to the intestate by the defendants, payable six months after date. The other counts were for moneys lent, advanced, paid, laid out and expended, by the intestate, &c. The defendant Hasbrouck alone appeared, and pleaded to all the counts, as follows: 1. the general issue: 2. *actio non accrevit infra sex annos, modo et forma*, as the plaintiff has declared against *him*; 3. That *he* (Hasbrouck) did not, at any time within six years, &c. undertake and promise, &c. in manner, &c. as the plaintiff has complained against *him*.

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Matthews v. Stone.

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rendered judgment for the plaintiff, the defendant sued out a writ of error.

*J. T. Brady*, for plaintiff in error.

*E. W. Bonny*, for defendant in error.

*By the Court*, COWEN, J. We think the court below erred. *Prima facie* all goods upon the demised premises are liable to distress for rent; but the law has made certain exceptions for the benefit of trade and business, within which the 2 R. S. 413, 2d ed. § 15, have brought "The property of boarders at taverns and boarding-houses." The general property in the furniture in question was in the plaintiff below, but was, at the time of the distress, in the actual use of the tenant, without the consent of the landlord, and by the permission of the plaintiff.

Clearly, the legislature never could have intended to protect the property of the boarder irrespective of his wanting it for his own use, or at least as a place of deposit for his own purposes as a boarder. A contrary construction would enable a man to demise or lend any amount of furniture to the tenant for his purposes; and then, by the former taking up his board at the house, he might cover it against the lessor's distress. Goods are protected for the purposes of trade; but they can be so only in respect to their immediate use for the purposes of trade by the person in whose favor the exception is made; not where they are lent or demised to the tenant who has them in deposit, though he may in this way be enabled the more effectually to take care of or transport other goods really the subject of trade, unless such lending, &c. be with the consent of the lessor. So the property of the boarder, in order to come within the exception, should pertain to him in the capacity of boarder.

Judgment reversed.

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Snyder v. Sponable.

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**SNYDER vs. SPONABLE.**

**A conveyance of lands was made to a husband and wife, upon which there existed a prior unrecorded mortgage. The mortgage was afterward foreclosed, and the purchaser under it sued the husband in ejectment, and recovered. The latter having died, the wife brought ejectment against one in possession under the foreclosure; and, on the trial, the defendant offered the former recovery against the husband in evidence, together with proof that it was obtained on the ground of his having been duly notified of the mortgage when he and his wife purchased. Held, not admissible.**

**Notice to a husband, at the time of receiving a conveyance to himself and wife of a prior unregistered mortgage on the land conveyed, will not operate as notice to the wife so as to give the mortgage a preference in respect to her title especially where she pays the whole consideration for the conveyance out of her separate estate.**

**Otherwise, if the consideration is paid by the husband out of his own funds, and he takes a conveyance to himself and wife, or to her alone, either by way of advance, or for the purpose of defrauding creditors.**

**On a conveyance to two or more as joint tenants or tenants in common, notice to one of them of a prior unrecorded mortgage will not affect the rest, except in the case of a trust estate. Otherwise, where the one receiving notice is agent for the rest.**

**Married women, lunatics, infants, and other persons not *sui juris*, are, in general, incapable of appointing an agent or attorney.**

**EJECTMENT, for a farm of 105 acres, in Minden, Montgomery county, tried at the Montgomery circuit, in May, 1840, before WILLARD, C. Judge. On the 13th September, 1813, *Walter L. Cochran* conveyed the farm to the plaintiff and her then husband, John Snyder, in fee, for the consideration, as expressed in the deed, of \$2700. The consideration, in fact, was a farm which the plaintiff then owned, and which she and her husband on that day conveyed to *Cochran*, for the farm in question. Snyder and his wife immediately took possession, and occupied the farm until the year 1822. The husband died in 1838, and the plaintiff thereupon brought this action to recover possession of the farm.**

**The defendant showed, that *John Rice* was the former owner of the farm, and on the 5th April, 1813, conveyed**

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it to *Cochran*, and took back a mortgage from *Cochran* to secure the payment of \$1850, a part of the consideration money, with interest. The mortgage was not recorded until March 31, 1819. There was a regular statute foreclosure of the mortgage, and a sale under it on the 29th December, 1820, to *Jacob A. Keeler*. Rice thereupon conveyed to *Keeler*, who immediately reconveyed to Rice; and Rice afterwards conveyed the farm to the defendant in fee.

The defendant gave evidence tending to show that *the plaintiff and her husband*, at the time they took their deed, had notice of the mortgage to Rice. The judge left it to the jury to say whether the *plaintiff* had notice of the mortgage; but he decided that notice *to the husband alone* would not affect *her* title. The defendant excepted. The defendant offered in evidence a judgment in an action of ejectment by James Jackson, on the joint and several demises of *Keeler* and *Rice*, against *Snyder*, the husband, to recover possession of the premises now in question. The action was commenced in May, 1821; it was tried in November following, and in January, 1822, judgment was rendered for the plaintiff. The defendant offered further to show, that the only question of fact in dispute between the parties on that trial was, whether *Snyder*, the husband, who was the defendant in that action, had notice of the mortgage at the time *Cochran's* deed was given. The judge rejected the evidence, and the defendant excepted. Verdict for the plaintiff. The defendant now moved for a new trial on a bill of exceptions.

*D. Cady*, for the defendant.

*J. A. Spencer*, for the plaintiff.

*By the Court*, BRONSON, J. It is difficult to see how the recovery by Rice in the ejectment suit which he brought against *Snyder*, the husband, can in any way affect the plaintiff's title. The recovery might have been had upon grounds wholly independent of the formal legal title. But

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it may be inferred from the defendant's offer that Cochran's deed and mortgage were both in evidence, and that Rice recovered on the ground that Snyder had notice of the unregistered mortgage. Still, as the suit was prior to 1830, the judgment determined nothing beyond the present right of possession. It would not conclude Snyder himself from trying the same matter over again; much less can it conclude the plaintiff, who was neither a party to the suit, nor had she then any right to the possession. Until the question of survivorship between the husband and wife was settled, the right of possession was in the former. (*Barber v. Harris*, 15 *Wendell*, 615. *Jackson v. McConnell*, 19 *id.* 175.) It is said that the judgment should have been admitted for the purpose of showing that Rice did not get the possession wrongfully. But the judgment, in connection with other evidence, was apparently offered for the purpose of making out an *estoppel*; and the defendant ought not now to complain that it was not admitted for a purpose which was not suggested on the trial. And besides, it was wholly unimportant how Rice got the possession, as the plaintiff was seeking to recover on the strength of her legal title. There was no complaint of a tortious entry.

I do not see how the plaintiff can be affected by the notice which her husband had of the unregistered mortgage. She does not claim by, through or under him, but in her own right. There is no privity between them. When an estate in fee is conveyed to husband and wife, they are not properly joint tenants, nor tenants in common; they do not take by moieties, but each is seized of the entirety, with a right of survivorship, and neither can alien without the other. Though, as the husband is entitled to the possession so long as he lives, he may convey that interest by way of mortgage. (*Barber v. Harris*, 15 *Wendell*, 615. *And see Jackson v. McConnell*, 19 *id.* 175.) Now, as the wife was seized of the entirety by virtue of the original conveyance from Cochran, she acquired no portion of the estate from her husband. His death only determined the

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survivorship, and rendered that certain which was before contingent, that she would hold the estate forever. I repeat, therefore, that she does not claim by, through or under the husband; and if she can be affected by the notice which he had, it must stand on some other principle than that of privity between the husband and wife. It was held in the time of Edward 3d, on a conveyance like this, that the husband's attainder for treason did not work a forfeiture of the wife's estate. (*Co. Litt.* 187, (a. b.))

On a conveyance to two or more persons, whatever may be the nature of their estate, I am not prepared to admit that notice to *one* would be sufficient to overcome the registry laws as to *all* of the purchasers. We have not been referred to any authority in support of such a position, nor has any fallen under my observation. It is easy to see why the estate of the fraudulent vendee should fail; but it is difficult to understand upon what principle the other and innocent vendee can also be punished for his transgression. This is not a question concerning the validity of the deed as between the immediate parties to it. The conveyance was undoubtedly operative as between Cochran and the grantees. But a third person comes in and says, the deed ought not to operate against me, because you had notice of my mortgage. The reason upon which the objection rests goes only to the party who had the notice; and such estate as he would otherwise have taken under the conveyance may well fail, without involving the other and innocent vendee in the same consequence. This would, I think, be so on a conveyance to several persons either as joint tenants—except in the case of a trust estate—or as tenants in common: and I see no reason why the same rule should not apply on a conveyance to husband and wife—especially where, as in this instance, the whole consideration for the estate was paid by the wife. It is true, that husband and wife are, for many purposes, regarded as one person; but they are not so for the purpose of visiting the wife with the direct consequences of the husband's fraud. In the case already referred to, (*Co. Lit.* 187, (a)) it was

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held, that the wife did not lose her estate by the attainder of the husband for high treason, and her heir recovered the land from the patentee of the king.

I do not deny that one of several joint purchasers may act as agent for the others, and then, as in other cases, notice to the agent will be notice to the principal. But in this case there was no conventional relation of principal and agent between the vendees. Both, as appears from the evidence, were present and acting when the purchase was made, and the wife joined, as she necessarily must have done, in the conveyance of the lands which were given in exchange for the farm in question. And besides, married women, infants, lunatics, and other persons not *sui juris*, are not, in general, capable of appointing an agent or attorney. (*Story on Agency*, 6, 7, 8, and cases cited. See also, *Bac. Ab. Attorney*, (B.) 7th Lond. ed. *Oulds v. Sanson*, 3 Taunt. 261.) Where both are parties to a suit, the husband appoints an attorney for the wife. But in *Dyer*, 271, (b) pl. 27, margin, the husband refused to suffer the wife to appear on proceedings against them continued to the *exigent*, and it was ruled by the court that in this case she might make an attorney to prevent being waived.

If the husband had purchased and paid for the land, it would have presented a different question. In that case, if he had taken the deed to both, or to the wife alone, either as an advancement to her, or for the purpose of defrauding creditors, (*Guthrie v. Gardner*, 19 Wend. 414,) I should have been prepared to admit that the deed could not prevail over the mortgage. (*Sugden on Vend.* 639, 5th Lond. ed.) The husband, being himself the purchaser, could not get rid of the effect of having notice of the mortgage, by taking a conveyance in the name of the wife, or any other third person. But here the wife was the purchaser. She paid the purchase money; or what is the same thing, gave her own lands in exchange for the property in question.

New trial denied.



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National Bank v. Norton.

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**NATIONAL BANK vs. NORTON, impleaded with SEAMAN and others.**

One partner, after dissolution, cannot bind his copartners even by the renewal of a partnership note.

Nor will a power reserved to him in the articles of dissolution *to settle the business of the firm, and for that purpose to use their name*, enable him so to bind his copartners.

The extent of a power *to settle*, considered and discussed.

In an action against makers and endorsers of a note, under the *act of April 25th, 1832, (Sess. L. 1832, p. 489,)* the plaintiff cannot resort to the original consideration as an independent ground of recovery.

The acts of one partner, though after dissolution, will bind his copartners in respect to all persons who have previously dealt with them as a firm, except those to whom *actual notice* of the dissolution has been given.

Notice of dissolution published in a newspaper, and thus accidentally reaching a bank director, is not equivalent to actual notice to the bank; especially where, by the charter, the director has no power to act for the institution save in conjunction with others.

Otherwise, *semble*, of notice to a director with express instructions to communicate it to the board of directors.

The acts of an officer of a corporation, unless official, or within the compass of an agency delegated to him, are not binding on the corporation.

**ASSUMPSIT**, tried at the New-York circuit in March, 1841, before GRIDLEY, C. Judge.

The action was brought by the National Bank against the defendants as makers and endorsers of a promissory note; the declaration containing the common money counts, with a copy of the note annexed. Norton alone defended the suit.

The note annexed to the declaration was dated January 18th, 1840, and purported to have been endorsed by "Seaman and Norton" as first endorsers, and Henry J. Seaman as second endorser; "Seaman & Norton" being the name of a former firm, composed of the said Henry J. Seaman and the defendant Norton.

Both the endorsements were in Seaman's hand-writing; and the principal question in the case was whether, under the circumstances, and as in favor of the plaintiffs in this suit the endorsement of the firm name by him was a ratification upon Norton.

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It appeared, among other things, that the firm of "Seaman & Norton" was dissolved on the 1st of February, 1837; and on that day a notice of the dissolution signed by Seaman and the defendant Norton was published in the "Courier and Enquirer"—a newspaper in the city of New-York, where the firm business had been carried on, and where the plaintiffs also conducted their business. The notice was as follows: "The co-partnership heretofore existing between the subscribers under the firm of Seaman & Norton is this day dissolved by mutual consent. *The business of the firm will be settled by Henry J. Seaman, who is duly authorized to sign the name of the firm for that purpose.*" A witness testified that, by the terms of the dissolution, Seaman was to take the effects of the firm, and settle all its liabilities.

It further appeared, that on the 24th day of January, 1837, the plaintiffs discounted a note for the firm of Seaman & Norton, of a large amount, drawn by the same makers with the one in question and endorsed by the firm; that this note was held by the plaintiffs when the dissolution of the firm of Seaman & Norton took place; that it had been renewed from time to time with deductions, as payments were made; and that the note in question was given by way of renewal thereof, for the balance then remaining due on the original loan.

It also appeared from the testimony of Seth Grosvenor, that he was a director in the National Bank (plaintiffs) in 1837; that he then knew of the dissolution of the firm of "Seaman & Norton"; that he saw a notice of it published in the newspapers of the city of New-York.

The circuit judge ruled at the trial, that the notice of dissolution above set forth, only imported that Seaman had power to settle the business of the firm, &c.; and that this did not give him the right to make the note in question, even by way of renewing the former one. He further held, that the fact of the dissolution coming to the knowledge of Mr. Grosvenor, one of the plaintiffs' directors, whose duty as a member of the board of directors was to pass on the

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discount and renewal of notes, and who therefore might be regarded as the plaintiffs' agent, was sufficient to charge the plaintiffs with actual notice thereof. A nonsuit having been ordered as in favor of Norton, the plaintiffs now moved to set the same aside, and for a new trial, upon a case.

*D. Selden*, for the plaintiffs, insisted that by the terms of the dissolution and the published notice, Seaman was authorized to use the firm name for the purpose of settling the partnership concerns: and this, if other authority were wanting, gave him the right of using the firm name, in respect to the note sued upon. But a partner, as such, has the right to renew notes of the firm after dissolution, where the effect, as in this case, is to *diminish* the obligation of the partners. He further contended that the circuit judge erred on the point of notice of the dissolution: That such notice to a director, would not charge the bank as having had actual notice; and that Seaman & Norton, having dealt as a firm with the plaintiffs, prior to the dissolution, actual notice alone could absolve Norton from liability. The plaintiffs moreover should have been permitted to recover as against the firm on the original consideration; as the renewal note, if invalid, did not extinguish their previous liability.

*C. M'Vean*, contra, denied that one partner could thus bind his co-partner by a renewal of the partnership note in the name of the firm, after dissolution. Seaman derived no authority from that relation to give the note in question. (*Bank of South Carolina v. Humphreys*, 1 *McCord*, 388. *Bell v. Morrison*, 1 *Peters' Rep.* 351. *Collyer on Part.* 314. *Manhattan Co. v. Vernon*, 17 *Wend.* 524. *S. C.* 22 *id.* 183.)

Nor did the authority in this case to *settle*, and use the partnership name, give Seaman the power to bind the firm, by the renewal note in question. It was limited as strongly as the most guarded language could limit it. (1 *H. Black.* 155. 3 *Day's Rep.* 353. *White v. Union Ins. Co*

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1 *Nott & McCord*, 561. *Foltz v. Pourie*, 2 *Dess.* 40. *Sanford v. Mickles*, 4 *John. Rep.* 224. *Hackley v. Patrick*, 3 *John. Rep.* 536. *Chitty on Bills*, 60, *ed. of 1839.* 1 *McCord's Rep.* 16. *Collyer on Part.* 314, 315. 3 *Esp. N. P. R.* 111.) The authority was intended to prevent Norton from settling; and to confine that right to Seaman, who took the partnership effects.

If the plaintiffs were dealers with the defendants, the publication of the dissolution in the gazette taken by the plaintiffs, and the knowledge of the director when it occurred, from such publication, were sufficient to charge the plaintiffs with actual notice. (*Collyer on Part.* 310, 311. *Manhattan Co v. Vernon*, 17 *Wend.* 524; 22 *id.* 183, *S. C. Bank of So. Car. v. Humphreys*, 1 *M'Cord*, 388. *Ketchum v. Clark*, 6 *John. Rep.* 144. *Irby v. Vining*, 2 *M'Cord*, 379. 3 *Day's Rep.* 353.)

The plaintiffs could not recover on the original note. If they gave it up and knew of the dissolution, they lost their right of action on it. The first note, moreover, was endorsed by and discounted to the defendants, Seaman & Norton, and the note produced was endorsed by them, and by Henry J. Seaman as a second endorser, who, in that capacity, negotiated it to the plaintiffs. And again, this suit was brought against the makers as well as the endorsers under the statute, and the statute confines the plaintiffs to the note annexed to the declaration. (2 *R. S.* 274, 5, 2d *ed.*)

*By the Court*, COWEN, J. It is settled that one partner cannot bind the other after dissolution, even by the renewal of a partnership note. This is the making of a new contract by one for all the partners, after his authority is revoked. During the continuance of the partnership he is entitled to act for all, as their general agent. On dissolution, he ceases to hold that character, and must be considered as a mere joint debtor. This leaves to him the power of payment in respect to debts due from the firm, but with slight exception, if any, nothing more. (*Bell v. Morrison*, 1

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*Pet. Sup. Court Rep.* 351, 367 to 374, and the cases there cited. *Bank of South Carolina v. Humphreys*, 1 *McCord*, 388.) The doctrine was assumed without question in *Vernon v. The Manhattan Co.* (17 *Wendell*, 524, 22 *id.* 183, *S. C.*;) and may be considered as adjudicated in that case both by this court and the court of dernier resort.

The note in question, a renewal note, which had been running in the bank before the dissolution, was renewed by Seaman, one of the partners, afterwards. It was of course void in respect to Norton, his copartner, unless a power of renewal was expressly delegated at the time of the dissolution. The plaintiffs claim that such power was delegated, and base themselves on the clause in the advertisement of dissolution declaring that the business of the firm was to be settled with Seaman, who was authorized to sign the name of the firm for that purpose. This was no more than a power to liquidate partnership demands and sanction the liquidation by the firm name. It no more gave power to renew the old note, than to give one payable in chattels. A. says to B., settle my debt with C., and sign my name for the purposes of such settlement. It is a strained and unnatural construction to say, that B. may use A.'s name in extinguishing the old contract by executing such new one in A.'s name as he pleases. The agent can do no more than deal with the old debt by paying or stating an account. The word *settle*, as here used in respect to the debts due from the firm, (and the word *business* no doubt covers these,) is thus defined by Mr. Webster—"To adjust; to liquidate; to balance or to pay; as, to settle accounts." (*Web. Dict.* "*Settle*," *pl.* 18, 4<sup>th</sup> ed.) That this is so understood by courts, may also, I think, be collected from several of the cases cited by the learned counsel for the defendant on the argument. (*Kilgour v. Finlyson*, 1 *H. Black*, 155. *Morratt v. Howland*, 3 *Day*, 353. *White v. Union Ins. Co.* 1 *Nott & McCord*, 561. *Sanford v. Mickles*, 4 *John. R.* 224.) Others cited by him are in point. (*Abel v. Sutton*, 3 *Esp. R.* 108, 111. *Martin v. Walton*, 1 *McCord*, 16. *Hacking v. Patrick*, 3 *John. R.* 536.) These were all cases of an express author

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ity to settle, after dissolution, yet the first holds that the power did not extend to endorsing a partnership note even in liquidation of a partnership debt. In the second, it was denied to be a power of renewal; and in the third, a power of *adjustment* was denied to operate as an authority to sign an account stated. In the case at bar an express power to use the name is given; but it is confined to the purposes of adjustment, (settlement.) The words did not work an extension of power in any respect beyond the form of doing the business.

Were the points already considered, therefore, the only ones in the case, there can be no doubt that the plaintiffs were properly nonsuited. No verdict, upon the ground that the endorsement being inoperative left the old claim against these parties untouched, could be taken against the firm for the original consideration. Such a position would be quite doubtful in any view; for the present note was operative as to all who had actually made and endorsed, and was doubtless received as an agreed substitute or discharge of the firm note. It was not a mere nullity, like usurious or forged paper. But a decisive answer lies in the form of the action. It was brought as a joint action for several claims under the statute of 1832, (*Sess. L. p. 489*), by a declaration containing the common counts, with a copy of the note, against makers and endorsers. In such an action you cannot go behind the note immediately in suit, nor do I see that, independently of the statute, the plaintiffs could have done any better. Viewed at common law, here would be a plain misjoinder of parties defendants.

These considerations, however, are not yet decisive against the plaintiffs. The note in question being an attempt to renew an old note of the firm, which lay in the plaintiffs' bank, and was confessedly binding on the firm, the partners must be considered as dealers with the plaintiffs, who were therefore entitled to actual notice of the dissolution before they could be affected by it. (*Vernon v. The Manhattan*

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*Co. 17 Wend. 524; 22 id. 183. S. C. on error.*) (a) Such actual notice did in fact reach Grosvenor, a director of the plaintiffs; and notice to the agent is notice to the principal. The rule, however, does not mean an agent with powers short of the transaction to which his notice relates. A director, as such, has no independent powers of business by the act incorporating the plaintiffs. (*Sess. L. of 1829, p. 468, § 12.*) He is but one of fifteen directors who must act as a board, and can act in no other way as directors. One may certainly be clothed with other powers. Grosvenor, for instance, might have been made renewal agent generally, or of the note in question; and having that capacity, the notice of dissolution might have affected the bank, not as notice to a director, but to an agent representing the bank in a particular department of business. Independently of that, a notice of the dissolution given to him for the express purpose of being communicated to the board, would perhaps have been sufficient, for the duty of making the communication would then have devolved upon him as director. He must necessarily, perhaps, be considered as the agent of the bank to that extent. On this, however, we are not called upon to pass one way or the other, nor

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(a) As to those who have had no dealings with the firm prior to the dissolution, notice by advertisement in a newspaper of the city or county where the business is carried on will suffice. (*Ketchum v. Clark, 6 John. R. 144, 147, 8. Mowatt v. Howland, 3 Day's R. 353. Lansing v. Gaine et al. 2 John. R. 300. Nott v. Downing, 6 Lou. R. (Curry) 680, 683. Graves v. Merry, 6 Cowen's R. 701. Kelly v. Hurlburt, 5 id. 534. Martin v. Walton, 1 McCord's R. 16. Shaffer v. Snyder, 7 Serg. & Rawle, 503, 4. Bank of So. Car. v. Humphreys, 1 McCord, 588. Colly. on Part, 311, 312, Springsf. ed. 1834.*) In respect to a dormant partner, no notice whatever is requisite; he being protected from the acts of his copartners by dissolution alone. (*Kelly v. Hurlburt, 5 Cowen's R. 534. Carter v. Whalley, 1 Barn. & Adol. 11. Armstrong v. Hussey, 12 Serg. & Rawle, 315.*)

It seems, that where actual notice of dissolution is necessary, proof that the party (e. g. a bank) sought to be charged with it, took a newspaper in which the notice was published, is a fact from which the jury are authorized to infer actual notice; (*Bank of So. Car. v. Humphreys, 1 McCord, 388; Martin v. Walton, id. 16; and see Greene v. Merch. Ins. Co. 10 Pick. 402, 406, 7;*) but is not *per se* equivalent to actual notice. (*Vernon v. Manhattan Co. 22 Wend. 183, 191, 2. 17 id. 524, 527, S. C. See also Rowley v. Horne, 3 Bing. 2.*)

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do we mean to do so. In the case at bar, he was not addressed as one of the directors. He happened to know the fact of dissolution, as a director or other corporator may do, without perhaps being aware that the bank could be prejudiced by it. Not having any intimation that it was material, it is too much, even if the point were in the case, to insist on a presumption that he ever communicated the fact to the board. Not having acquired his knowledge as director, there is no room for presumption either on the ground of duty or interest. In *The Fulton Bank v. Benedict*, (1 *Hall*, 480, 497, 557,) the judge told the jury that notice to a director who appeared to have had charge of the business to which it related was not notice to the bank, unless communicated to the board, or to the officers of the bank. Oakley, J. said the charge was too narrow for the case; adding, "I think that under some circumstances, notice to a director ought to charge the corporation, as where the director acts in any particular business as the special agent of the bank, as in the case of *Rathbone*. He was one of a committee to inquire as to this very note," &c. *The Washington Bank v. Lewis*, (22 *Pick.* 24, 31,) takes the same view of a director's agency. In *The Hartford Bank v. Hart*, (3 *Day*, 491, 5,) the court said, the directors have certain powers resulting from their act of incorporation, and are, for certain purposes, agents, and their acts, when in strict relation to their agency, are binding on the corporation. See also *Stewart v. Huntington Bank*, (11 *Serg. & Rawle*, 267, 269,) and *Hayward v. The Pilgrim Society*, 21 *Pick.* 270.) These cases show, what is indeed quite plain, that the acts of a director or other officer of a corporation, unless official, or in respect to his agency, are no more operative as against the institution than the acts of any ordinary corporator; and these no more so than the acts of a stranger.

In the case at bar the learned judge held, that proof of publishing the notice, and actual knowledge in the director whose duty, as one of the board, it was to pass on the discount and renewal of notes, and who was therefore to be



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regarded as the agent of the plaintiffs, was sufficient proof of their knowledge. In this we think he erred. The board were the agents for the purposes mentioned, and they should acquire this sort of knowledge as such, or at least the firm should show notice brought home to some other agent specially authorized by the bank, or by the course of their business, to receive it.

A new trial should therefore be granted, the costs to abide the event.

New trial ordered.

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 POOL vs. POOL.

The plaintiff, a man of advanced age, transferred a house and some other property to the defendant and another, his two sons, they covenanting to pay his debts, amounting to within \$450 of the value of the property, and to support him during life; also to "keep and maintain" his two younger children, one of whom was J., then eleven years old, until they should respectively arrive at the age of twenty-one, "in a manner suitable for the said P. (the plaintiff,) to provide for them in case he should live and had not conveyed away his property." J. having remained with the defendant six years under this arrangement, left him and had not since returned. *Held*, that the plaintiff could not recover for J.'s board or clothing after he had thus left, the covenant, in effect, only binding the defendant and his brother to provide for him *as a member of the family*; especially, as it did not appear that the plaintiff had incurred any expense on J.'s account, or that the latter had at all suffered for want of aid.

COVENANT, tried before CUSHMAN, C. Judge, at the Albany circuit in December, 1839. The plaintiff owned a house and some other property, worth in all about \$600, and owed debts to about \$150; and on the 8th of April, 1828, entered into a sealed contract with his two sons, *Abraham Pool*, the defendant, and *John Pool, jun.*, by which the plaintiff assigned his property to the two sons, and they, on their part, covenanted to pay the plaintiff's debts. They further covenanted as follows:—that we "will keep and maintain our said father, John Pool, in boarding, lodging, washing, clothing, medicine and suitable attend-

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ance, and all other necessary things, suitable for his condition in life, for and during his natural life." Also—"that we will *keep and maintain* Jeremiah Pool, the son of the said John Pool, and Dorothy Pool, the daughter of the said J. P., until they shall respectively arrive at the age of twenty-one years, that is to say, we will *keep and provide* for them in a manner suitable for the said John Pool to provide for them in case he should live and had not conveyed away his property." The action was brought for not keeping and maintaining the plaintiff's son *Jeremiah* in pursuance of the covenant.

The plaintiff was about sixty-eight years old, and Jeremiah was about ten or eleven years old when the contract was made. Jeremiah lived with, and was provided for by the defendant until he was about seventeen years old, and then voluntarily left the defendant, and never returned. It did not appear how, or by whom he had been provided for after he left the defendant. The plaintiff proved that it would be worth \$25 a year to clothe Jeremiah from the time he left the defendant until he was twenty-one years old. The judge decided that the defendant was not bound to *board* Jeremiah after he went away, but he was bound to provide him with *clothing* after he left; and that the plaintiff was entitled to recover such amount as would be sufficient to clothe Jeremiah from the time he left until he was twenty-one years old. The defendant excepted, and the jury found a verdict for the plaintiff for \$112. The defendant now moved for a new trial on a bill of exceptions.

*S. Cheever*, for the defendant.

*M. T. Reynolds*, for the plaintiff.

*By the Court*, BRONSON, J. If we look at the contract in connection with the facts as they existed at the time, there can be no great difficulty in understanding what the parties meant by this family arrangement. The plaintiff, being then about sixty-eight years old, transferred his little property to his two sons, Abraham and John, on their un-

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dertaking to pay his debts and provide for him for life ; and on their further agreement to provide for the plaintiff's two younger children, Jeremiah and Dorothy, until they should respectively attain the age of twenty-one years. The two sons were, of course, to have possession of the house and other property ; and I think it quite evident that the plaintiff was to live with them. Such also must, I think, have been the intention in relation to the two younger children Abraham and John were "to keep and maintain," or, as it is afterwards expressed, "keep and provide" for them ; and it was to be done "in a manner suitable for the said John Pool [the father] to provide for them in case he should live and had not conveyed away his property." In short, the intention seems to have been, that Abraham and John should become the head of the family, and should stand *in loco parentis* to the two younger children. The property which the two sons received did not exceed four hundred and fifty dollars in value after the payment of debts, and it is impossible to suppose that they were to provide for the two children in any other way than as members of their family. Jeremiah remained with, and was provided for by the defendant, until he became old enough to render his services of some value, and then voluntarily went away and never returned. After he became seventeen years of age, it is but reasonable to suppose that he was able to earn something more than enough to procure board and clothing suited to his condition in life ; and as the defendant provided for him when helpless, and lost the benefit of his services when they would have been valuable, it is the defendant, and not the plaintiff, who has reason to complain.

But should we wholly disregard the amount of consideration, I do not see how this recovery can stand. The plaintiff did not show that he had supported Jeremiah or incurred any expense whatever on his account since the making of the contract. Nor did it appear that Jeremiah had suffered in any way for the want of the defendant's aid. And besides, it is fairly inferable from the case, that

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the defendant was ready and willing to continue a suitable provision for Jeremiah—he was ready and willing to “keep and maintain” him—and was only prevented from doing so by the wrongful act of the other party. It is impossible to maintain, that this contract bound the defendant to provide for Jeremiah although the latter should refuse to accept the provision; and yet such, in effect, is the case on which the plaintiff has recovered. If there was the least color for saying that the defendant had not always made a suitable provision for Jeremiah before he went away, it is a sufficient answer that the case was not put upon that ground at the circuit.

I see no ground for the distinction which was taken on the trial between board and clothing. But that is not important, as the plaintiff was not entitled to recover either for the one or the other.

New trial granted.

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### MORTON vs. NAYLOR.

An order not payable on its face in money, and drawn on a particular fund, is not a bill of exchange within 1 R. S. 757, § 6, 2d. ed. requiring a *written* acceptance. So *held*, in respect to an order by a landlord on his tenant to pay *the rents* accruing during a specified period; and this, though it appeared on inquiry *aliunde* that the rents were payable in money.

Where a landlord, for value received, gave an order on his tenant to pay W. the rents accruing during a certain time, which the tenant, on the order being presented, said he would do; and the landlord subsequently notified the tenant not to pay, but the latter disregarded the notice, and paid the order: *Held*, that the tenant did right, and that the landlord's claim for the rent was extinguished.

An order of this nature operates an equitable assignment of the fund on which it is drawn, and the drawee being notified of the assignment, must pay accordingly, though there be no formal acceptance either written or verbal.

On error from the New-York common pleas. Morton sued Naylor in the court below. The *declaration* was in replevin, for taking, &c. certain goods. *Avowry*, for three months rent, \$200, due by one Morgan, tenant, under a

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demise from J. Russell, who granted to the defendant. The goods were distrained on the demised premises. *Pleas*, third and fourth, in substance that, before Russell granted to the defendant, he for value received made his bank check of \$500, payable to one Warner; and, to secure its payment, drew a written order on Morgan, the tenant, *to pay Warner the quarterly rents as they might become due during the year*, covering the rent in question; which order was accepted by Morgan. That the check not being paid by the bank, and Warner requiring payment of the rent in question from Morgan, the latter accordingly paid it. *Replication* to said pleas, that before Morgan accepted the order on him to pay the rent, Russell revoked it. *Rejoinder*, denying the revocation, and concluding to the country.

The proof at the trial was, that Warner presented the order to Morgan, who verbally accepted it, telling Warner he would not pay to any one beside him. Morgan told Russell that he had accepted the order, and the latter instructed him to pay accordingly; but afterwards forbade the payment, because Warner had sued him. Morgan, however, paid the order, disregarding the countermand of Russell.

The court below directed a verdict for the defendant, to which the plaintiff's counsel excepted; and judgment having been rendered accordingly, the plaintiff sued out a writ of error.

*J. W. Gerard*, for plaintiff in error.

*A. L. Jordan*, for defendant in error.

*By the Court*, COWEN, J. There is no color for calling the order on Morgan a bill of exchange, requiring, therefore, a written acceptance within the statute. (1 R. S. 757, 2d ed. § 6.) It is payable out of a particular fund; and, indeed, is not payable in money on its face. It is to pay rents, which may be due in wheat, fowls, or services,

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as well as money. It is an order to pay the quarterly rents; and with the oral explanation that the rent was pecuniary, it is a money order, accepted by parol, but sought to be revoked after acceptance and before payment. That could not be done. The order to Morgan was an equitable assignment of the rent in question to Warner, with notice to Morgan, who was bound to pay it according to the order, whether he had accepted or not. The cases are entirely decisive. (*Israel v. Douglass*, 1 *H. Black.* 239, 242.) Here Lord Loughborough said, in respect to an order like the one in question: "This debt is with the consent of the parties assigned to the plaintiff, (the payee.) Douglass (the drawee) has notice of it, and assents, by which assent he becomes liable to the plaintiff." This case was recognized and strongly acted on in *Weston v. Barker*, (12 *John. Rep.* 279, 289.) *Yeates v. Groves*, (1 *Ves. jun.* 280,) is still more nearly in point. It held that an order without acceptance was an assignment, and that the drawee having notice merely, might pay it, even as against the bankrupt assignee of the drawer. *Ex parte Alderson*, (1 *Mad. Rep.* 53,) is also exactly in point. In *Lett v. Morris*, (4 *Sim.* 607,) such an order was enforced as an assignment, though the drawee refused to accept. (See also *Clark v. Mauran*, 3 *Paige*, 373. *Bradley v. Root*, 5 *id.* 632, 641, and the cases there cited.) I refer to cases in chancery to show, that an order for value is *per se* an equitable assignment to the payee of the debt due from the drawee to the drawer. Our own rules at law as to enforcing such an assignment are well known. We give it the same effect as would a court of chancery.(a)

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(a) See *Johnson v. Thayer*, (5 *Shepley*, 401,) *Legro v. Staples*, (4 *id.* 252,) *Adams v. Robinson et al.* (1 *Pick.* 461,) *Welch v. Mandeville*, (1 *Wheat.* 233,) *Mandeville v. Welch*, (5 *id.* 277.) In the latter case, it was said, that the rule protecting an assignee, after notice, from the acts of the assignor, does not apply to cases where the assignment is only of part of a fund. And see *Robbins v. Bacon*, (3 *Greenl.* 346,) *Tierman v. Jackson*, (5 *Pet. R.* 580.) The contrary, however, has been held in this state. (*Taylor v. Bates*, 5 *Coxen*, 376. *Wheeler v. Wheeler*, 9 *id.* 34. *Pattison v. Hull*, *id.* 747.)

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It follows, that the payment by Morgan to Warner, extinguished the rent. The distress was tortious, and the court should have directed a verdict for the plaintiff below.

Judgment reversed.

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**COOK and another vs. SPAULDING and others.**

A member of a partnership or an incorporated banking association cannot be compelled to testify against them in a suit prosecuted for their benefit in the names of others.

The privilege of a *party in interest* of refusing to testify has not been affected by 2 R. S. 405, § 71

ASSUMPSIT, tried before DAYTON, C. Judge, at the Chautauque circuit, in July, 1840. The action was on a promissory note made by the defendants, for \$781,17, dated August 8, 1838, and payable to the plaintiffs on demand. The defendants called *Hiram Gardner* as a witness, and offered to prove by him a state of facts which would constitute a good defence to the action. The note in question was owned by the *Niagara Suspension Bridge Bank*, "a partnership or unincorporated banking association," and the suit was brought in the names of the plaintiffs for the benefit of the bank. Gardner was, and from the beginning had been, one of the copartners and shareholders in the association. The witness insisted that he was a party in interest, and declined being sworn. The judge decided that the witness could not be compelled to testify without his consent. The defendants excepted, and the jury found a verdict for the plaintiffs. The defendants now moved for a new trial on a bill of exceptions.

*S. Stevens*, for the defendants.

*C. P. Kirkland*, for the plaintiffs.

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*By the Court, BRONSON, J.* This question was decided in *Mauran v. Lamb*, (7 Cowen, 174.) It was there held, that the real plaintiff, though not a party to the record, could not be required, without his consent, to give evidence for the defendant. In *The People v. Irving*, (1 Wend. 20,) it was again held, that a party in interest cannot be compelled to testify without his consent. The same doctrine was also recognized in *Jackson v. Myers*, (11 Wend. 537.) The cases of *Appleton v. Boyd*, (7 Mass. Rep. 131,) and *White v. Everest*, (1 Vermont Rep. 181, 2,) are to the same effect.

It can make no difference in principle, that Gardner is not the sole party in interest, but only one of several co-partners and shareholders in the bank. In *The King v. The Inhab. of Woburn*, (10 East, 395,) the rateable inhabitants of the parish of St. Alban were in fact, though not in form, parties to the appeal, and it was held, that one of the rateable inhabitants of the parish could not be compelled to testify.

It is said, that the rule laid down in *Mauran v. Lamb*, has been changed by the subsequent statute, which provides, that a witness shall not be excused from answering on the ground that the answer may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit. (2 R. S. 405, § 71.) The statute does not, in terms, reach this case, and should not, I think, be applied to it. It must be admitted that there is no great difference in principle between calling a party in interest, and calling a witness whose answer may charge him with a debt, or subject him to a civil suit; but a distinction has been taken between the two cases, and it is now too late to reconsider the question. This distinction was taken in *Mauran v. Lamb*, (7 Cowen, 174,) and the authority of that case has been recognized since the statute was passed, though the statute was not mentioned. (*Jackson v. Myers*, 11 Wendell, 537. And see Cowen & Hill's Notes to Phil. Ev. 740, 1.) It may be added, that the case of *Mauran v. Lamb*, where the distinction was stated, was before the



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legislature at the time the statute was passed—it having been cited in the notes of the revisers; and had it been intended to change the rule laid down in that case—that the party in interest cannot be called without his consent—more appropriate language would have been used to effect that object.

Our statute is substantially the same as that of 46 *Geo. 3, c. 37*, which was enacted after the discussion which arose on the impeachment of Lord Melville, where the chancellor and eight, against four, of the judges, were of opinion that, at the common law, the witness was bound to answer although it might subject him to a civil suit. (1 *Phil. Ev.* 277. 1 *Hall's Am. Law Jour.* 223.) This should probably be regarded as a declaratory statute, rather than one introducing a new rule. (See *Cowen & Hill's Notes to Phil. Ev.* 740.) But however that may be, the distinction between calling the party in interest, and a witness whose answer may subject him to a civil suit, was maintained in the subsequent case of *The King v. The Inhab. of Woburn*, (10 *East*, 395.) It was there held, that the English statute had not changed the rule that the party in interest, though not in form a party to the record, was not obliged to answer.

If this were a new question, I should be inclined to the opinion that any one not a party to the record might be required to answer; but the rule, as to a party in interest, is settled the other way.

**New trial denied.**

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**Beers v. Culver.**

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**BEERS vs. CULVER.**

Where A. made and lent to B. a note, expressly to enable the latter to borrow money from a particular person, and, instead of using it for that purpose, B. delivered it to C. as collateral security for a previous debt, C. taking it with knowledge of the circumstances under which it was made; *held*, that the note was not an available security in C.'s hands.

And C. having transferred the note to D., (who also knew the circumstances under which it was given,) upon a promise by the latter to pay the debt of C. against B., *held*, that the promise was without consideration, and therefore void.

A plaintiff who seeks to recover upon a promise to pay the debt of a third person, must declare specially, and cannot avail himself of it under the common counts.

MOTION to set aside the report of a referee. *Stephen Fessenden*, on the 9th of November, 1837, made his note dated September 2, 1837, for \$1440, payable to *William Bradley, jr.* or bearer, one year after date, and lent it to Bradley, for the purpose of enabling him to raise money on it from *one Wood*—if the money was not obtained, the note was to be returned to Fessenden. No money was obtained on the note. Bradley being indebted to the plaintiff in about the sum of \$120, delivered him the note as collateral security for the debt—telling the plaintiff at the time, that the note had been made to raise money. The defendant also had a debt against Bradley, and in consideration that the plaintiff would let him have the note of Fessenden, promised to pay the plaintiff the amount of his debt against Bradley. The defendant knew at the time for what purpose the note had been made. The plaintiff claimed in this action to recover the balance due him from Bradley, amounting to \$119,83. The declaration contained the common counts for money, goods sold, and an account stated. The referee reported that nothing was due the plaintiff.

*D. B. Prosser*, for the plaintiff, now moved to set aside the report.

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 Van Cortlandt v. Kip.
 

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*J. Taylor, contra.*

*By the Court, BRONSON, J.* Although the referee overruled the objection in relation to the form of the pleadings for the purpose of hearing the evidence, and also refused a nonsuit, the objection was renewed after the evidence was closed, and, so far as appears, the referee may have placed his final decision upon that ground. The objection was, I think, fatal to the action. The plaintiff was seeking to recover on a special contract to pay the debt of Bradley, and he should have counted specially on the promise.(a)

I am inclined also to think the promise void for want of consideration. The note was not an available security in the hands of the plaintiff. It was no better than a piece of blank paper. He lost nothing by parting with it, and the defendant got nothing by receiving it. It is of no importance that the defendant knew the note was not a valid security. His knowledge that he got nothing by the arrangement could not supply the want of a consideration for the promise.

Motion denied.

(a) See *Quin v. Hanford*, (ante, p. 82, 86.)

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### VAN CORTLANDT and others vs. KIP.

A., by his will, after making various specific devises, gave to his brother and three sisters, his interest in eighty acres of land which he and they owned in equal undivided proportions; and then constituted B. residuary devisee as to his other real estate. A., having afterward purchased the shares of his brother and sisters in the eighty acres, made a codicil, revoking the clause in the will devising his interest in the eighty acres. *Held*, that at his death the shares of his brother and sisters purchased by him after the execution of the will, passed under it to the residuary devisee; but the other share, having been specifically devised, descended to his heirs, though by reason of the codicil, that devise, as such, was rendered inoperative and void.

A codicil to a will of real estate, when executed in the mode prescribed with respect to devises, will amount to a republication of the will, bringing down its language and causing it to speak as of the date of the codicil; and this whether the immediate subject of the codicil be real or personal property.

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A codicil need not be *actually annexed* to the will, in order to have it operate as a republication.

Where a codicil is so executed as to operate a republication of the will, both should be read and construed together as one entire instrument.

Though a devising clause in a will be utterly void as such, at the time when it is made, or be annulled afterward by a codicil, yet it may operate as a declaration of intent to prevent the property passing to the residuary devisee.

Otherwise as to a bequest; for the residuary legatee takes all the personal property which, at the testator's death, is not found to have been otherwise *effectually disposed of* by the will.

The distinction between devises and bequests in this particular has not been abolished by 2 R. S. 2, § 5, 2d ed.

EJECTMENT, tried at the Westchester circuit, before KUGGLES, C. Judge, in April, 1839. The action was for two adjoining parcels of land in the town of Cortlandt, Westchester county; the first parcel, supposed to contain about 80 acres, and the other about 30 acres. The jury found a special verdict showing, among other things, the following facts:

Both parcels belonged formerly to the late Philip Van Cortlandt, in fee, with another considerable tract of land in the neighborhood. The plaintiff, Pierre Van Cortlandt, was a brother of said Philip, and Cornelia Beekman the other plaintiff, a sister. They were entitled to the one undivided half of the two parcels in question, as heirs of said Philip, unless cut off by his will under which the defendant claimed.

This will was dated March 9th, 1824. At the latter period the first parcel of 80 acres was owned in fee by the testator, the two plaintiffs, and Catharine Van Wyck and Ann Van Rensselaer, two other sisters of the testator, as tenants in common, in equal proportions, by virtue of a devise from their deceased father.

The 30 acres had been purchased by the testator of a stranger.

The will first disposed of the main body of the testator's real estate in parcels, viz. 600 acres to his brother Pierre, one of the plaintiffs, in fee; 200 acres to his sister Cornelia, the other plaintiff, in fee; 200 acres to his sister Ann in fee; and 200 acres to his sister Catharine for life. with re-

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mainder to her son Philip G. Van Wyck. These parcels were particularly described in the will, and devised subject to the payment of what the testator might be indebted to his father's estate. The whole was mentioned as having come to him by descent from his father, who held it in tail. Then, after devising two other parcels in order to make provision for the payment of what might be due from him to Catharine, *he devised his interest (being one fifth) in the 80 acres to the plaintiffs, Pierre and Cornelia, and his sisters Catharine and Ann, in fee, as a compensation for moneys which he had received from one Walter Fowler, and from certain lands of his father's estate.* The 80 acres were described particularly in the will. The will next recited that, having thus far disposed of the estate devised to him from his grandfather and father, he should now proceed to dispose of the estate he had acquired in addition; going on and devising *all the residue of his real and personal estate to his nephew Philip G. Van Wyck, in fee, subject to the payment of all his debts not before provided for,* making him (Philip G. Van Wyck) one of his three executors. The will *reserved, in terms, power to make a codicil.*

Afterwards, on the 1st of January, 1828, the testator purchased and took a conveyance in fee of all his brother's and sister's interest in the 80 acres.

On the 18th January, 1831, he made a codicil, *referring to his will, and to the power therein reserved of making a codicil;* and then, after correcting a verbal mistake in the description of one of the parcels devised by the will, and declaring that a devise therein to Pierre C. Van Wyck had become void by reason of his death, made certain devises and bequests to said P. C. Van Wyck's son. As to the 80 acres, he recited the provision made by his will to pay what he had received from Walter Fowler and others, by the devise of one fifth to his brother and sisters; that he had since purchased their interests and stood chargeable with all the debts due from him to the estate of the deceased father; and then added, that conceiving the whole of that *clause*

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*useless, he did thereby direct the said clause to be revoked and made void to all intents and purposes.*

Both the will and codicil were duly attested to pass real estate.

The testator died November 5th, 1831, leaving the plaintiffs, with said Ann Van Rensselaer and the children of said Catharine Van Wyck, his heirs at law.

The defendant claimed the whole of the premises in question as lessee of Philip G. Van Wyck, the residuary devisee; and took and maintained exclusive possession.

*A. L. Jordan*, for the plaintiffs.

*C. O'Connor*, for defendant.

*By the Court*, COWEN, J. The claim of the plaintiffs to the parcel of 30 acres is entirely untenable in any view, and was abandoned on the argument.

As to the other parcel, their right depends on the question whether the codicil was a republication of the will. If a republication, it must be read as dated in 1831, and as applicable to the state of things then existing; and so carrying the four fifths of this parcel purchased intermediate the date of the original will and codicil, to Philip G. Van Wyck, the residuary devisee.

It seems to me that at this day it would be a violation of all reliable authority, to deny that a codicil duly attested to pass real estate, would, *per se*, whether it relate to real or personal property, operate as a republication of a devise, unless the testator declare that he does not intend the codicil should have that effect. The English cases to this point are well summed up in Jarman's late edition of *Pow. on Dev.* vol. 1, p. 611, note 1, and are decisive. So far as American cases have spoken, they are, I apprehend, all the same way. (*Dunlap v. Dunlap*, 4 *Dessauss.* 321. *Brownell v. Brownell*, 3 *Mason*, 486, 494. *Musser's lessee v. Curry*, 3 *Wash. C. C. Rep.* 482. *Mooers v. White*, 6 *John. Ch. Rep.* 375. *Hickman v. Holliday*, 6 *Mon.* 587. *Hatch v.*

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*Hatch*, 2 *Hayw.* 33, 4.) In all these cases, the point is stated without hesitation by learned judges, and in several, the strongest English cases are approved. The ruling to the contrary by Lord Camden, C. in *The Attorney General v. Downing*, (*Ambl.* 571,) was expressly repudiated in *Barnes v. Crowe*, (1 *Ves. jr.* 486,) on a consideration of all the previous cases. The latter decision has been uniformly adhered to in England, and recognized by learned judges in the American cases I have referred to, either expressly or tacitly. Among the English cases, *Rowley v. Eyton*, (2 *Meriv.* 128,) is much in point. To doubt upon the question at this day, would be to violate all rules for determining the force of judicial authority.

It is not necessary, therefore, to inquire, whether this case be not within one of the admitted principles of *The Attorney General v. Downing*, which case was the main, not to say the sole reliance of the plaintiff's counsel—I mean the principle of annexation. In *Barnes v. Crowe*, Lord Commissioner Eyre, who delivered the opinion, said, the case might be put on annexation, for the will declared an intent that it should operate on all lands the testator should die seized of; and although the codicil was of mere personalty, yet he said the testator had thus inseparably annexed the codicil to the will, not by a wafer or wrapper, but by *internal annexation*. So here, the will reserves the right to make a codicil, which is made accordingly, not merely of personal property, but in order to revoke a particular devise, and make other alterations both in respect to real and personal estate. It is better, however, as was done in *Barnes v. Crowe*, to go on the more obvious and certain distinction, aside from the acknowledged danger of letting in parol evidence if we go on the idea of annexation, more especially if we take physical annexation. Vide *Pigott v. Waller*, (7 *Ves. jr.* 98, 117,) wherein all the cases are again considered, and *Barnes v. Crowe* followed. In *Goodtitle v. Mcredith*, (2 *Maule & Selw.* 5, 13,) the judges concurred in what was said by Lord Ellenborough.

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Ch. J., viz: "What the effect of a codicil is, has been settled in a series of cases, beginning with *Acherly v. Vernon*, down to *Barnes v. Crowe*, and lastly, in a more recent case of *Pigott v. Waller*. The effect of all these decisions is, to give an effect to the codicil *per se* and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shown, in which case it will repel that effect." Again: "The codicil draws the will down to its own date, in the very terms of the will, and makes it operate as if it had been executed in those terms."

Thus in the case at bar, we must read this will as if it had devised all except the four fifths in question, and then had said, "I devise the residue to Philip G. Van Wyck." That carries the four fifths to him, and protects the defendant for so much.

With regard to the remaining one fifth, the will, on the theory established, reads in this way: "I devise one fifth to my brother and sisters—other parts of my real estate I devise to them. All the residue of my real estate, I devise to Philip G. Van Wyck. I direct the above clause, devising one fifth to my brother and sisters, to be revoked and made void to all intents and purposes." This would certainly nullify the devise of the one fifth, as such, to the brother and sisters; but then the question arises between the heirs on one side, and the residuary devisee on the other, upon a state of things differing from that in respect to the four fifths—for there was no attempt in the will to devise the latter, except to the residuary devisee. With regard to the former, the version is, "I devise it to my brother and sisters, residue to *Philip G. Van Wyck*;" and then the subsequent revocation, though it avoids the specific devise as such, yet takes it out of the residuary clause. The declaration of the testator may be read, "I declare it void to all intents and purposes, *as a devise*;" and since the decision of the court for the correction of errors, (*Van Kleek v. The Dutch Church of New-York*, 20 Wendell,



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457,) I think it must be so read. The case holds that if a man attempt to devise certain of his land, the residue to another; though the first devise be utterly void as such, yet the mere attempt and mention of the land with that view, take it out of the residuary clause. If I am not mistaken in the principle of that case, the plaintiffs are entitled to recover the one half of one fifth of the tract of eighty acres, as described in the special verdict.

The defendant is undoubtedly correct in saying that the residuary clause, had it been of personal property, would have carried the one fifth. (*Ward on Legacies*, 30, and the cases there cited.) But this seems to be put upon the fluctuating character of personal property. It is impossible to sustain it on the different meaning of the words. These have of themselves the same import in both cases. It does not, therefore, depend on the distinction, that a will of real estate speaks at the time of its date, whereas a will of personalty speaks at the time of the testator's death; for, in this view, both would carry all property ineffectually devised or bequeathed at the time when it actually speaks. The contrary was held in *Van Kleeck v. The Dutch Church*, with regard to devises. I make these remarks, because it was urged at the bar, that since the 2 R. S. 2, 2d ed., § 5, there is no longer any reason for keeping the distinction on foot. The section cited does, indeed, declare that a devise in any form, denoting an intent to pass all a man's real estate, shall now be construed to pass all the real estate devisable by him at the time of his death. In this respect it speaks at the same time as a will of personalty; and it was thrown out by a learned senator that this might possibly work a harmony of meaning. (*Senator Wager*, p. 499.) But the reasoning of judges, including the senator himself, I understand as placing the distinction on the nature of the property to which the words are applied. (*See 6 Paige*, 619, S. C. and S. P.)

I am of opinion there should be judgment that the plaintiffs recover as to half of one fifth of the eighty acre

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parcel, as described in the special verdict; and as to the residue of the premises in question, judgment for the defendant

Ordered accordingly.

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LONG vs. LONG.

An action of *debt* will not lie for the breach of a sealed contract to *pay a note, and save the plaintiff harmless and indemnified therefrom*, where the amount of the note does not appear in the contract.

In a suit on a judgment of a court of a neighboring state, the plea showed the judgment void for want of jurisdiction as to the person of the defendant; and *held*, that a replication stating the defendant to have been *personally duly notified by the officer who served the process by which the suit was commenced, &c.* without showing to what the notice related, was bad in substance.

So, of a replication that the defendant had *personal notice of the commencement of the suit, &c.*, it not appearing who gave him notice.

The words, *personally notified*, are improper in pleading, where the object is to show that a court had acquired jurisdiction of the person of a defendant. The averment should be, that *he was served with process to appear, &c.*; or, *that he appeared in the action, &c.*

ON demurrer. The 1st, 2d and 3d counts of the declaration were in *debt*, on sealed articles of agreement entered into between the parties, physicians and surgeons, containing various stipulations on both sides, and among others, that in case the plaintiff should not, within a given time, resume the practice of physic and surgery in Chesterfield, county of Franklin and state of Massachusetts, the defendant would *pay certain notes* (not mentioning their amount) *given by him and the plaintiff for the purchase money of real estate in Chesterfield*, and save the plaintiff harmless and indemnified therefrom; but if the plaintiff chose to resume the practice, &c. as aforesaid, then the defendant was to discontinue his practice at that place, &c. Averments, that though the plaintiff did not resume practice, &c. *the defendant had not paid the notes, or any part, &c. nor had he saved the plaintiff harm'less and indemnified, &c.* but on the contrary, through his default in that respect, the

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plaintiff had been obliged to pay a large amount, to wit, the sum of \$12,000 upon said notes; whereby the plaintiff became and was indebted, &c. &c.

The 4th count was in the usual form on a judgment recovered by the plaintiff in the court of common pleas of the county of Franklin, Massachusetts.

The defendant demurred to the 1st, 2d and 3d counts, assigning the causes of demurrer specially, and among others, that the action should have been *covenant* and not *debt*. Joinder.

To the 4th count the defendant pleaded specially, to the effect, that he was never served with any writ, process or notice of the suit, &c. in which the judgment declared on was obtained; nor did he ever appear in said suit, &c. or litigate or defend the same either in person or by attorney or counsel, or have any knowledge of the pendency of said suit, &c. until long after the rendering of said judgment, &c.

To this the plaintiff put in two replications: the first alleging, that the defendant, at the time of the commencement of the suit wherein the judgment was obtained, was in the county of Franklin, Massachusetts, "and was then and there *personally duly notified* according to the rules and practice of the court and of the laws of Massachusetts," by the officer who served the process by which the suit was commenced, &c.; but it did not state to what the notice related. The other replication stated, that the defendant "had personal notice of the commencement of the suit," &c.; but did not show by whom the notice was given.

The defendant demurred to the replications, assigning the causes specially. Joinder.

*M. T. Reynolds*, for the defendant

*S. Stevens*, for the plaintiff.

*By the Court*, BRONSON, J. The first, second and third counts, are, I think, bad, because the action should have been *covenant* and not *debt*. It is not an action for the re

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covery of a sum of money *in numero*, but one sounding in damages. The certainty of the sum demanded does not appear by the contract, nor does the contract give any *data* from which the sum can be ascertained by computation. The agreement is special, containing several stipulations, and that part of it on which the plaintiff relies is, in effect, a covenant to indemnify and save harmless. The damages are unliquidated. (*Bull. N. P.* 167. 1 *Chit. Pl.* 123, 128, *ed.* '37.) It is true that debt will sometimes lie where the certainty of the sum has to be made out by averment; but not, I think, on a covenant of indemnity. If debt will lie on this agreement, there are few cases where the plaintiff may not declare in that form on a sealed contract, however special in its terms, and uncertain as to the sum to be paid, provided the pleader will do, as he has done here, go on to aver that the plaintiff has sustained damages to a large amount, to wit, to the sum of so many dollars. I have met with no case which supports these counts. *Tilson v. The Town of Warwick*, (4 *Barn. & Cress.* 962,) on which the plaintiff relies, went on the ground, that the obligation of the defendants to pay the money demanded was imposed by an act of parliament, in which case debt may be maintained.

The fourth count is on a judgment recovered by the plaintiff against the defendant in the court of common pleas of the county of Franklin in the state of Massachusetts. The plea to that count contains a good answer to the action. It shows that the common pleas did not acquire jurisdiction over the person of the defendant. (*Starbuck v. Murray*, 5 *Wend.* 148. *Holbrook v. Murray*, *id.* 161. *Shumway v. Stillman*, 6 *id.* 447.) The first replication to the plea is informal, and, I think, insufficient. The substance of the plaintiff's allegation is, that the defendant was in the county of Franklin when the action in the common pleas was commenced, and, at the time of the service of the process in that suit, was *personally duly notified*, according to the rules and practice of that court and the law of Massachusetts, by the officer who served the process.

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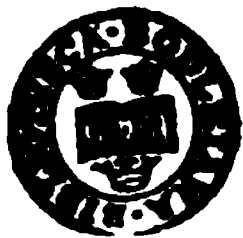
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The fact that the defendant was in the county of Franklin is of no importance, except as the foundation for an averment that he was served with process; and that averment is not made. It might, perhaps, be inferred from an allegation that a defendant was "personally duly notified" of a suit brought against him, that he was served with process to appear and answer. But parties should not plead in this argumentative way. They should state facts, and not the mere evidence of facts. This objection is specially pointed out in the demurrer.

But the replication is bad in substance. It states that the defendant was "personally duly notified"—but not of *the process*, the *action* or any thing else in particular. He had due notice; but of what? The pleader has stopped short of the conclusion at which he seems to have been aiming.

If due notice of the process or action had been alleged, I should still think the replication bad in substance, as well as in form. Due notice may sometimes be appropriate words in pleading, but when the enquiry is whether a court has obtained jurisdiction of the person of the defendant, the allegation that he was "personally notified" does not belong to legal language. The averment should be that he was served with process to appear and answer, or that he appeared in the action either in person or by attorney.

The second replication to the second and third pleas states, that the defendant "had *personal notice* of the commencement of the suit" in the common pleas; but does not tell us who gave him that notice. It is not enough that a defendant happens to hear that he is sued. No court can acquire jurisdiction in that way.



Judgment for the defendant.

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Hull v. Adams.

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## HULL vs. ADAMS.

The legal effect of a transaction as manifested by several distinct written instruments relating thereto, all executed at the same time, can no more be varied or contradicted by parol evidence than if the whole were embraced in one instrument.

Accordingly, the plaintiff being the assignee of a lease, and bound by covenant with the lessee to pay the rents, &c. assigned the same to the defendant by writing expressing a consideration of \$3000; whereupon the latter obligated himself by another writing to perform *all covenants which the plaintiff had entered into with the lessee*, and also executed to the plaintiff, at the same time, two notes, one promising to pay him \$2000, and the other \$1000: *Held*, that the writings taken together imported an undertaking by the defendant to pay the *whole* rent, and therefore evidence could not be received to show a contemporaneous parol agreement by which the plaintiff was to pay a *part*, he accepting the \$1000 note for his indemnity in so doing.

Otherwise, however, had the question stood solely on the consideration clause in the assignment.

**MOTION** to set aside the report of referees. The action was *debt* brought by Wager Hull, jun. to recover against the defendant Abel Adams, for services and board of the defendant's workmen; also upon a note under seal, whereby the defendant promised to pay the plaintiff \$2000 on the 1st November, 1840, with interest after the 1st May, 1839. The cause was referred to referees.

The principal question arose upon the defendant's claim to be allowed \$1000 as for money paid, &c. for the plaintiff; the facts in relation to which were as follows:

On the 5th of November 1837, one Cocks, by indenture, demised to Samuel C. Adams a brick-yard and dock for the term of twenty years from the 1st of May, 1838, at an annual rent of \$1000 per annum, payable on the 1st of May, &c. Samuel C. Adams, on the 11th of December, 1837, assigned his term to Hull the plaintiff, subject to the rents and covenants in the indenture, which the plaintiff covenanted to perform. On the 12th of January, 1839, the plaintiff, by writing, assigned the whole term (excepting a sub-lease of part) to the defendant, subject, as therein ex-

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Hull v. Adams.

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pressed, to the rents and covenants in the lease. This assignment was under seal, and purported on its face to have been given in consideration of \$3000 in hand paid, and in consideration of the defendant's having covenanted to perform all the covenants which the plaintiff was bound to perform by his covenant with Samuel C. Adams. On the same day and at the same time the following writings passed between the plaintiff and defendant, viz: 1st, a covenant of the defendant, "in consideration of the above assignment" (it being written under the latter) to keep and perform all the covenants of the plaintiff with Samuel C. Adams: 2d, two notes, by one of which, the defendant promised to pay the plaintiff \$1000 on the 1st of May, 1839; and by the other, \$2000 on the 1st of November, 1840, with interest after the 1st of May, 1839, being the note sued on. The notes, also, were under seal.

On the trial, the defendant offered to show by parol, that the plaintiff, by a verbal stipulation between them contemporaneous with the writings, was to pay the rent for the year ending on the 1st of May, 1839, the defendant having executed the note of \$1000 as an indemnity for that purpose; that the plaintiff neglected to do so, whereupon Cocks, the lessor, compelled him (the defendant) to pay it. He therefore insisted that he should be allowed this payment against the plaintiff's demand.

The plaintiff objected to the evidence, as tending to contradict and vary the legal import of the written instruments between the parties; but the referees admitted it, and allowed the defendant the \$1000, reporting a balance in favor of the plaintiff. The latter now moved to set aside the report.

*M. T. Reynolds*, for the plaintiff.

*A. L. Jordan*, for the defendant.

*By the Court*, COWEN, J. The evidence objected to, seems to have been treated by the referees as relevant merely to the amount or nature of the consideration expressed in the

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Hull v. Adams.

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plaintiff's assignment; and if it were nothing more, the testimony would have been unobjectionable, within *McCrea v. Purmort*, (16 *Wend.* 460,) and the cases there cited. Had the whole stood on the clause acknowledging the payment of the \$3000, it can scarcely be questioned that the plaintiff's oral obligation to pay one third of it, in discharge of the current rent, would have been admissible in evidence.(a) But there was much more to encounter. Take, as you must, all the papers passing between these parties together, and consider them one instrument—for they were all executed at the same time, and relate to the same subject—you then have an assignment from the plaintiff to the defendant subject to his covenant which is in legal effect to pay all the rent thereafter to accrue; and this, over and above his covenant to pay the plaintiff \$3000, in several instalments. These covenants on the part of the defendant are diametrically inconsistent with the obligation sought to be fastened on the plaintiff by oral evidence. The notes, the provisions of the assignment, the express covenant at the bottom, would all be contradicted by it, both in their direct language and legal effect. That cannot be done.(b) The motion to set aside the report must prevail.

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Motion granted.

(a) See *Cowen and Hill's Notes to 1 Phil. Ev.* 1441 *et seq.* and the cases there cited.

(b) See *Cowen & Hill's Notes to 1 Phil. Ev.* 1420 to 1425.



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Otis v. Wakeman.

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## OTIS and another vs. WAKEMAN.

**Actions** against special bail and upon bail bonds, should, in general, be brought in the court where the original suit was commenced; though when necessary they may be brought in other courts.

When the action is unnecessarily brought in a court other than that in which the original suit was commenced, the remedy of the party is by *motion*, and not by *plea*.

Accordingly, in debt on a recognizance of bail taken in the supreme court of another state in a suit commenced there: *held*, not a good plea, that the defendant, at and ever since the time of becoming bail, &c., was and still is a freeholder and resident of such state, subject to the jurisdiction thereof; these facts shewing nothing more than a case for equitable relief by *motion*.

Such an action is in its nature transitory; and the fact that it arose in another state, or even in a foreign country, is not an objection to the jurisdiction of our courts respecting it.

A plea to the jurisdiction of a superior court should show that there is another court of the same state or country in which effectual justice may be done.

DEBT, on recognizance of bail taken in an action of assumpsit brought by the plaintiffs against A. F. James, and Wm. R. Taylor, in the supreme court of the state of *New-Jersey*. *Plea*, to the *jurisdiction*, that this court ought not to take cognizance of the action, because at and ever since the time of becoming bail, the defendant was and still is, a freeholder and *resident* of the state of New-Jersey, within and subject to the jurisdiction of the supreme court of that state. *Replication*, that the plaintiff's, at the time of the commencement of this suit were, and still are, citizens and residents of this state. Demurrer and joinder.

*R. W. Peckham*, for defendant.

*J. L. Wendell*, for plaintiffs.

*By the Court*, BRONSON, J. The replication is good for nothing. The question is on the plea. Actions against special bail and upon bail bonds, should, in general, be brought in the court in which the original suit was com

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Otis v. Wakeman.

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mened: though where there is a necessity for 'doing so, the action may be brought in another court. In this case, there was no necessity for suing in this state, and the action should have been brought in New-Jersey, where the defendant could have such relief as the laws of that state and the practice of its courts may afford to special bail. But the defendant's remedy was by *motion*—not by *plea*. So are all the cases. (7 *John. R.* 318. 9 *id.* 80. 12 *id.* 459. 13 *id.* 424. 3 *T. R.* 152. 1 *Burr.* 642. 3 *Wils.* 348.) In *Matthews v. Cook*, (13 *Wend.* 33,) this matter was set up by *plea*, and judgment was given for the plaintiff, on the ground that the remedy was by motion. True, the original suit in that case was in a court of this state; but that cannot alter the principle. The action is in its nature *transitory*, and the fact that it arose in another state, or even in a foreign country, does not go to our jurisdiction. (*Glen v. Hodges*, 9 *John. R.* 67. *Rea v. Hayden*, 3 *Mass. Rep.* 24. *Rafael v. Verelst*, 2 *W. Black.* 1055, 1058. *Doulson v. Matthews*, 4 *T. R.* 503. *Mostyn v. Fabrigas*, *Cowp.* 161. *Comyn's Dig. Action*, (n. 12.) *Gould's Plead.* 234, 2d ed. 1 *Chit. Plead.* 300, ed. of 1837.) The plea should show that some other court in the same *state* or country has jurisdiction. (*Lawrence v. Smith*, 5 *Mass. Rep.* 362. *Rea v. Hayden*, 3 *id.* 24. And see *Mostyn v. Fabrigas*, *Cowp.* 172. 1 *Chit. Pl.* 479, ed. of 1837.) The facts stated in the plea do not go to the jurisdiction of the court. They only make out a case for equitable relief on motion.

Judgment of *respondeat ouster*.

CASES IN THE SUPREME COURT.

Waco & Rice.

Waco & Rice and another.

...ment by the ... is a deed absolute on its face and recorded as such  
...st ... from the same source; held, the  
... plain ... by oral evidence that his deed was in  
... did not consist directly of facts or  
... mainly of the grantor's declarations  
... of some kind, but entirely indefinite  
... as to the ...

... is a court of equity, oral evidence to ...  
... except on the ground of  
... in no case to be admit-  
... in the present instance as

... Knoxville. Orleans coun-  
... the Orleans circuit, in  
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Webb v. Rice.

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this suit was commenced. *Knowles* said, the plaintiff told him that Moore had deeded the lot to him, (the plaintiff,) and *if Moore paid a bank note, he would deed the lot back to him.* *Parker*, the other witness, said, the plaintiff told him, in a conversation about the deed, that *Moore was to have the land back if he (Moore) paid the consideration money, or paid a certain note which the plaintiff had endorsed for Moore*—which form of expression was used the witness could not state. *Moore*, the grantor, was examined on interrogatories as a witness for the defendants, and testified, that the deed was executed and deposited with the plaintiff to secure him for his endorsement for the witness, and for no other consideration—that it was expressly understood the deed was not to be put upon record, but was to be retained by the plaintiff in his possession as a private collateral security for his said endorsement, and that whenever the witness called for the deed the plaintiff was to deliver it up to him.

In answer to an objection by the plaintiff that the evidence to prove a defeasance was uncertain and contradictory, the judge decided that if the jury believed the testimony of *Moore*, or that *any* defeasance to the deed was established, *although the terms of that defeasance were not proved*, the defence was established, and the defendants must have a verdict. The judge charged the jury in conformity to the foregoing decisions, and upon all of the points exceptions were taken by the plaintiff. Verdict for the defendants. The plaintiff now moved for a new trial on a bill of exceptions.

*S. Stevens*, for the plaintiff.

*M. T. Reynolds*, for the defendants.

NELSON, C. J. and COWEN, J. considered the case as within the prior decisions of this court, allowing oral evidence, in a court of law, to show that a deed, absolute on its face, was in fact intended as a mortgage; and were of opin-

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Webb v. Rice.

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## WEBB vs. RICE and another.

In ejectment by the grantee in a deed absolute on its face and recorded as such against persons claiming by deed subsequent from the same source; *held*, that the plaintiff's recovery might be defeated by oral evidence that his deed was intended as a mortgage, though the evidence did not consist directly of facts occurring when the deed was executed, but mainly of the grantor's declarations made long afterward, importing a defeasance of some kind, but entirely indefinite as to the terms of it.

BACKEON, J. dissented, holding that, even in a court of equity, oral evidence to contradict the terms of a deed should not be received, except on the ground of fraud or mistake; and that, at law, such evidence ought in no case to be admitted. He, moreover, regarded the evidence relied upon in the present instance as especially objectionable, and wholly insufficient.

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In answer to an objection by the plaintiff that the evidence to prove a defeasance was uncertain and contradictory, the judge decided that if the jury believed the testimony of *Moore*, or that *any* defeasance to the deed was established, *although the terms of that defeasance were not proved*, the defence was established, and the defendants must have a verdict. The judge charged the jury in conformity to the foregoing decisions, and upon all of the points exceptions were taken by the plaintiff. Verdict for the defendants. The plaintiff now moved for a new trial on a bill of exceptions.

*S. Stevens*, for the plaintiff.

*M. T. Reynolds*, for the defendants.

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RACNEON, J. dissented, holding that, even in a court of equity, oral evidence to contradict the terms of a deed should not be received, except on the ground of fraud or mistake; and that, at law, such evidence ought in no case to be admitted. He, moreover, regarded the evidence relied upon in the present instance as especially objectionable, and wholly insufficient.

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DACSON, J. dissented, holding that, even in a court of equity, oral evidence to contradict the terms of a deed should not be received, except on the ground of fraud or mistake; and that, at law, such evidence ought in no case to be admitted. He, moreover, regarded the evidence relied upon in the present instance as especially objectionable, and wholly insufficient.

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the administration, might have taken her place, and gone on with the action; but we think he has an election, and cannot be compelled to do so against his will.

Motion denied.

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**THE PEOPLE, *ex rel.* The Bank of Watertown, vs. THE ASSESSORS OF THE VILLAGE OF WATERTOWN.**

Associations formed under the general banking law are *corporations*, and, as such liable to taxation on their capital.

The case of *Warner v. Beers*, (23 *Wendell*, 103,) explained; and additional reasons advanced in support of the decision in *Thomas v. Dakin*, (22 *Wendell*, 9.)

MOTION for a mandamus. *The Bank of Watertown* is an association formed under the act of 1838, (*Statutes of 1838*, p. 245,) with a capital paid and secured as the statute directs, of \$100,000; and carrying on the business of banking in the village of Watertown. A tax having been voted in pursuance of the village charter, (*Statutes of 1838*, p. 366,) the assessors of the village proceeded to make the necessary assessment, and in doing so, they assessed the relators \$100,000, the amount of their capital stock. By the 7th section of the village charter, the assessors are to proceed in the same manner as assessors in towns. (*See 1 R. S. 414, Art. 4, and Ontario Bank v. Bunnell*, 10 *Wend.* 186.) The relators applied to the assessors to correct the assessment, insisting that they were not a corporation, and therefore not liable to taxation on their capital; but their objection was overruled.

*S. Stevens*, for the relators, now moved for a mandamus commanding the assessors to strike out the assessment.

*D. Burwell*, opposed the motion.

*By the Court*, BRONSON, J. The counsel of both parties are agreed in waiving all minor points, for the purpose of

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having the judgment of the court on the single question, whether associations formed under the general banking law are corporations, and so liable to taxation on their capital. That they are corporations, was adjudged by this court in the case of *Thomas v. Dakin*, (22 *Wend.* 9,) and the like judgment between other parties has since been affirmed in the court for the correction of errors. (*Warner v. Beers*, 23 *Wendell*, 103.) I am aware that one or two members of the court entertained some doubt upon this question, but they seem finally to have settled down upon the conclusion, that although these banking companies may be corporations for all other purposes, yet they were not so within the spirit and meaning of that clause of the constitution which requires a two-thirds vote for the creation of a body politic or corporate. Mr. Senator Verplanck, who went further than any one else towards denying their corporate capacity, concluded his opinion with the very cautious and guarded remark, that "these associations under the banking law do not *rightly fall within the true legal interpretation of the restraining clause of the constitution*, and still less within its spirit and design." This is far enough from saying that the free banks, as they are sometimes called, are not corporations to every intent and purpose save that which relates to the mode of creating them. True, the constitution speaks of "*any* body politic or corporate," without limit or qualification; and although I have never been able to see how one class or description of corporations can be in, and another out of the provision, yet others have been able to make such a distinction; and it was, I presume, upon this ground that the learned senator proceeded when he said, that these banks "do not rightly fall within the true legal interpretation of the restraining clause of the constitution." If he meant to affirm, without any qualification, that they were not corporations, it is but reasonable to suppose that he would have said so.

The lieutenant governor was equally guarded in his remarks. His conclusions were, 1. That associations formed under the banking act "are not corporations *within the*

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*spirit and true intent of the constitution ;”* and 2. “*But if corporations,* still that the said act, even if within the letter, *does not come within the spirit and intent* of the ninth section of the seventh article of the constitution, and, *therefore,* the act was constitution lly passed.” Every one who knows the lieutenant governor, will readily admit, that if he had been prepared to say that these banks are not corporations, he would have said it, and that too in unequivocal terms, instead of placing his judgment upon another ground. No man better understands the force of language than he does, and it is but justice to say, that he never seeks to avoid the full responsibility of his station.

There is no ground for supposing that the other members of the court intended to deny the corporate capacity of these associations. The resolution which was adopted was carefully worded, so as to exclude any such inference. It does not affirm that the free banks are not corporations, but only that they are not such “*within the spirit and meaning of the constitution.*” If the object was to declare that these associations are not corporations at all, or for any purpose, why was any thing said about “the spirit and meaning of the constitution?” It would be highly derogatory to the court to assume that this qualified language was used without meaning ; and it would be still more objectionable to suppose that the proposition was submitted in this form for the purpose of catching votes, and then using the resolution as evidence that the court intended to affirm a principle to which few, if any, of the members were prepared to give their assent.

A brief reference to some facts which do not appear in the case as reported, will serve the double purpose of vindicating the court against misconstructions of the resolution, and showing that the members who voted for it were far enough from intending to affirm that these banks are not corporations. On the day, or the day following the decision of the court for the correction of errors in the case of *Warner v. Beers*, a resolution was offered by Mr. Senator Verplanck, affirming in direct and unqualified terms

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that these associations, "are not bodies politic or corporate." Whether the mover was himself prepared to vote for such a resolution, or whether it was only offered for the purpose of collecting the sense of the members on the abstract proposition which it contained, I am unable to say. But that such a resolution could not have been passed, is, I think, quite clear. It was laid on the table by common consent, and was not again taken up until thirteen or fourteen days afterwards. When the consideration of the resolution was again resumed, it was immediately amended by unanimous consent—the mover himself, as I believe, not objecting to that course—by adding the very significant words, "within the spirit and meaning of the constitution;" and in that form it was adopted. Now, whatever may be inferred from simply reading the resolution as it finally passed, the history which I have given of its original form and subsequent progress, renders it impossible to say, that any member who voted for the resolution intended to deny that these associations are corporate bodies. In confirmation of this remark, I may add the further fact, which does not appear by the report, that the chancellor, who fully agreed with this court in the opinion that these banks were corporations, voted for the resolution as amended—indeed, I believe the amendment was proposed by him, and for the avowed purpose of meeting the views of those who agreed with him in the opinion that the free banks, though corporations, were not such within the intent and meaning of the constitution.

I have said thus much concerning the case of *Warner v. Beers*, because so much pains have been taken out of court to misstate the point decided, that some of the members of the bar seem to have fallen into the prevalent error of supposing that the court of last resort has held that our free banks are not corporate bodies; and the question whether they are corporations or something else, is so often presented, in one form or another, that it is high time the decision should be properly understood. What the court for the correction of errors may hereafter hold upon this ques-



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tion, I will not undertake to determine, though I think there is very little probability that any court will ever say, in explicit terms, that these banks are not corporations.

Although it is enough that this question has been decided, yet as there is an apparent disposition to agitate the point anew, and as I did no more in the case of *Thomas v. Dakin* than concur with my brethren in asserting the corporate capacity of the free banks, it may not be amiss to say a few words by way of assigning some of the reasons for my opinion. After the full discussion which the subject has received at the hands of my associates, it cannot be necessary for me to consider it much at large.

A corporation aggregate, is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person. It does not occur to my mind that any thing else can be essential to the definition. Such a union as I have mentioned, can only be effected under a grant of privileges from the sovereign power of the state. A corporation is therefore said to be a legal being, or the mere creature of law. It is convenient, though not absolutely necessary, that this artificial person, like a natural one, should have a name by which it may be known and designated in the transaction of business. And when the doctrine was, that a corporation could only contract by its seal, a seal was said to be an indispensable requisite. So, immortality was once thought to be an attribute of all corporations: but that now means no more than a continued succession of members for such period, whether long or short, as may be allotted to this legal entity by its creator.

Now, a banking association formed under the law of 1838, not only may, but it must have a name: and a seal, though far from being essential to the existence of a corporation, is nevertheless an incident to the grant of corporate privileges, though not mentioned in the grant. This is

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not only so at the common law, but by the statute also. (1 R. S. 599, § 1.) The right to sue and be sued is expressly conferred on these associations; and whether the suit is brought in the name by which the company transacts its other business, or with the addition of the name of its president, cannot be material. A corporation may have one name for one purpose, and another name for another purpose. And besides, the general banking law only provides, that actions *may*—not that they *shall*—be brought in the name of, or against the president; and the right to sue and be sued, like that of having a common seal, is not only a common law incident to the grant of corporate powers, but the legislature has expressly provided that this power shall vest in every corporation, although not specified in the act under which it shall be incorporated. (1 R. S. 599, § 1, 2.) We have already held, more than once, that these associations may sue or be sued in the same corporate name by which their other business is transacted.

The individuals composing these associations are united in one body, and the members lost in the corporate existence. It is not the individual members, but the legal being which acts and transacts business. A continued succession of members, without changing the identity of the body, is also as completely secured to these institutions as it ever was to any other corporation. As to the period or duration of this continued succession, they surely have scope and verge enough. I observe from the articles on file, that one of these associations has agreed to live about five thousand years, and there is nothing in the general bank law to prevent the associates from writing eternity, instead of time, as the period of corporate existence. It is true that the association may come to an end somewhat short of the mark, and the one to which I allude has, I believe, already expired, but that was no fault of the charter.

What I had specially in view in adding any thing to what has already been said upon this question, was to bring the matter to a single and very plain test. Take one of

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these associations when formed pursuant to law, say the Bank of Commerce in the city of New-York, and compare it with its neighbor, the Bank of America, which has a special charter from the legislature; and then I have yet to learn what corporate capacity the one wants which the other has. No man can, I think, point out a substantial difference in the nature or essential attributes of the two institutions. The individual members are as completely merged in the legal body, and a succession of members is as effectually secured in the one case as in the other. In both cases, it is the body, by means of its officers and agents—and not the individual members—which acts and transacts business. If the one is not a corporation, the other is not a corporation.

We must not examine the charter of these associations in detached parcels, and say that neither this power nor that makes a corporation. It is quite easy when the parts of a time-piece have been separated, to place the finger upon each wheel in succession and say, this is not a clock. But let the parts be again combined and the machine be set in motion, and it will then require some hardihood to deny that it is a clock. We must look at these associations as they appear when formed and in action, and then they fall nothing short of that legal entity which has hitherto been called a corporation. Others may doubt this. I cannot.

The principal difference between a safety fund, and a free bank, consists in the fact that the latter has larger privileges than the former. But whether a corporation or not, does not depend upon the number or magnitude of its powers, nor the manner in which they were conferred. An association under our general laws for a village library, or to tan hides, possesses all the essential attributes of a corporation in as great perfection as the Bank of England, or the East India Company. Nor is it important in what mode, or by what name or particular agency, this artificial being transacts its business. It is enough that it has a capacity to act in some form as a legal being.

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It may be true, as has been argued, that the legislature intended to make a legal being and give it all the essential attributes of a corporate body, and yet that it should not be a corporation. That, the legislature could not do. I do not refer to any *written* constitution. The constitution of things—the order of nature—forbids it. Human powers are not equal to the task of changing a thing by merely changing its name.

Although there may be something in “the spirit and meaning of the constitution” which will save this class of corporations from its influence, there is nothing in “the spirit and meaning” of the tax laws which should exempt the relators from the same public burdens that fall on other monied corporations deriving an income from their capital.

We entertain no doubt that associations formed under the general bank law of 1838, are corporations, and as such are liable to taxation on their capital.

Motion denied.

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WILLIAMS & MACY vs. BUSH & SPICER.

Two partners, A. & B., gave a bond and warrant of attorney to C. & D. to secure the latter for endorsements made and money loaned to the use of the firm. Afterward, they dissolved, A. assigning all his interest in the partnership effects to B., who thereupon agreed to indemnify A. against the partnership debts. The fact of the dissolution, as well as its terms, having been duly communicated to C. & D., they entered up judgment on the bond and warrant; and then went on loaning moneys to B., under an agreement with him, but without A.'s consent, that the judgment should stand as security for these loans also. *Held*, that B.'s agreement was inoperative as to A., who might insist that the money collected under the judgment from the individual property of B., should go primarily to extinguish the debt for which the bond and warrant were originally given; and sufficient having been so collected, and an attempt then made to enforce the judgment against the individual property of A., a perpetual stay of proceedings was ordered as to him.

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MOTION by the defendant Spicer, to be relieved from the judgment and execution in this cause. The facts are sufficiently stated in the opinion of the court.

*Le Grand Marvin*, for the defendant, Spicer.

*S. Stevens*, for the plaintiff, Macy.

*By the Court*, BRONSON, J. Prior to 1835, the defendants, Bush & Spicer, were partners, and carried on business as coach and wagon makers at Buffalo, and the plaintiffs, Williams & Macy, were brokers in that city. The plaintiffs from time to time endorsed the defendants' notes, and also made them loans of money. On the 14th of November, 1834, the defendants gave the plaintiffs their joint bond and warrant of attorney, on which a judgment was perfected July 6th, 1835. The bond was in the penal sum of \$10,000, with a condition to indemnify and save the plaintiffs harmless against their endorsements for the defendants, and to pay the plaintiffs all sums of money loaned by them to the defendants.

On the 12th of January, 1835, the defendants dissolved their partnership, on which occasion Spicer assigned all his interest in the partnership effects to Bush, and Bush paid Spicer \$1000, and agreed to discharge all the partnership debts, and fully to indemnify Spicer against the same. The plaintiffs had notice of the dissolution, and of the terms on which it was made. The defendants were at this time indebted to the plaintiffs for moneys loaned, to about the sum of \$2100. It is not alleged that the plaintiffs have paid any thing on their endorsements for the defendants, or that there are any such liabilities outstanding.

After the dissolution, the business was carried on by Bush, and the plaintiffs made loans to him, he agreeing that the judgment should stand as a security for those loans. On the 3d of November, 1835, the plaintiffs dissolved their partnership, after which Macy made loans to Bush on the like understanding, that the judgment should also stand as

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a security for those loans. The loans made to Bush by the plaintiffs jointly, and by Macy individually, amounted in the aggregate to about \$3200. Spicer had no notice of the arrangements between the plaintiffs and Bush.

In October, 1836, Macy caused an execution to be issued on the judgment, on which the sheriff was directed to levy about \$5300—the amount then claimed to be due for the loans made to Bush & Spicer before, and to Bush after the dissolution of their partnership. In January, 1837, the individual property of Bush, being certain real estate in Buffalo, was sold under the execution, and bid off by Macy for the sum of \$3500. Bush has removed to Illinois, and is utterly insolvent.

On this case the plaintiff, Macy, insists, that he has the right to apply the proceeds of the sale under the execution to the satisfaction of the loans made to Bush after the dissolution of his partnership with Spicer, and to use the judgment against the individual property of Spicer for the purpose of collecting the amount of the loans made to Bush and Spicer while they were partners. This, I think, he cannot do. It would be highly inequitable and unjust.

On the dissolution of the partnership, the assets which were assigned to Bush constituted the primary fund for the payment of their debts; and although the creditors of the firm might also reach the individual property of each of the partners, yet, as between the partners themselves, there was a plain equity in favor of Spicer to have the debts satisfied out of the property of Bush. As Bush had agreed to discharge all the liabilities of the firm, he was to be regarded as the principal debtor, and Spicer stood in the character of a surety, and was entitled to all the equitable liens on the property of his principal. (*Waddington v. Vreedenburgh*, 2 John. Cas. 227.) The plaintiffs not only had notice of the dissolution, but they knew also the terms upon which it was made. They then held the bond and warrant of attorney, and the judgment, when it was subsequently entered, as a security for the partnership debts, and for nothing else; and they were not at liberty to enter into

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any new arrangements with Bush which should defeat the existing equities between him and his former partner.

The bond was in terms conditioned for the satisfaction of the joint liabilities of Bush & Spicer, and if Bush could by any parol agreement give it a larger operation as against himself, he could not do so to the prejudice of his copartner.

I do not think it necessary to enquire, whether Spicer could have compelled the plaintiffs to resort to the property of Bush before calling on him for the partnership debt. The property of Bush has in fact been sold, and the question now is, how shall the proceeds be applied? I think they should go, so far as is necessary for that purpose, to the satisfaction of the partnership debt, and that the balance only should be applied to the individual debt of Bush. This is the justice of the case; and as the judgment was entered on a bond and warrant of attorney, and there are no complicated equities between the parties, it was not denied on the argument that adequate relief might be afforded by this court, without sending the parties into another forum.

Other facts are stated in the papers, tending strongly to show that this judgment ought not to be used against Spicer, but he has, I think, a clear equity on the case as already stated.

As more than enough to satisfy the partnership debt has already been made under the execution, there should be a perpetual stay of proceedings on the judgment as against the defendant Spicer.

Ordered accordingly.

## TURNER vs. BURROWS.

After the plaintiff had executed a writ of inquiry, the defendant's attorney agreed to waive a motion he was about making to set aside the proceedings, and gave a cognovit for the same amount at which the damages had been assessed: whereupon the plaintiff's attorney stipulated not to perfect judgment until a specified period thereafter, but delivered the stipulation upon an express parol condition, that the defendant should pay all the disbursements attending the execution of the writ of inquiry, which the latter neglected to do, though repeatedly requested:—*Held*, that the 63d rule did not apply to the case, and that the plaintiff was regular in perfecting judgment on the inquisition in disregard of the terms of his stipulation.

Under the act of May 14th, 1840, (*Sess. Laws 1840, p. 327.*) judgment may be entered in vacation, on a writ of inquiry returnable at the succeeding term.

In cases within that act, a writ of inquiry is valid, though returnable in vacation.

MOTION to set aside judgment for irregularity. This suit was commenced in November, 1840. The defendant's default for want of a plea having been duly entered, the plaintiff, pursuant to notice for that purpose, proceeded on the 15th of February last to execute a writ of inquiry, and had his damages assessed at \$3328.87. The defendant on the same day gave notice of a motion to be made at the next March special term to open the default. He also insisted that the inquisition had been taken in violation of an order to stay proceedings. On the 26th of February the defendant's attorney agreed with the plaintiff's attorney to waive the motion and the defence, and gave a cognovit for the same amount of damages which had been assessed by the jury; and the plaintiff's attorney stipulated not to perfect judgment or issue execution until the first day of April. This arrangement, as the plaintiff's papers state, was made on the express condition that the defendant paid the disbursements attending the execution of the writ of inquiry. After those disbursements had been several times demanded without being paid, the plaintiff's attorney, on the 10th day of March, gave notice in



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writing to the defendant's attorney, that as the conditions of the agreement had not been complied with, he should treat the cognovit as a nullity, and proceed to enforce the plaintiff's claim under the inquisition. On the same day the plaintiff perfected judgment on the writ of inquiry, which was returnable on the first day of the then next May term.

*I. Harris*, for the defendant, moved to set aside the judgment for irregularity. He said the condition set up by the plaintiff concerning the payment of disbursements was void within the 63d rule because it was not in writing, and the plaintiff was not, therefore, at liberty to proceed to judgment before the first of April. But at all events the plaintiff was irregular in proceeding to judgment on the inquisition before the return day of the writ of inquiry had arrived.

*P. Gansevoort*, contra.

*By the Court*, BRONSON, J. The 63d rule does not apply to a case like this. We cannot allow an attorney to disregard his verbal agreement and thus set aside a judgment where there is no pretence of a defence on the merits. As the defendant refused to perform the condition on which the cognovit was received, the plaintiff was at liberty to treat the arrangement as at an end and proceed to judgment on the inquisition.

It has been said that writs of inquiry of damages are not process within the statute relating to the testes and return of process. (*Cook v. Tuttle*, 2 *Wendell*, 289.) Still, according to the former practice, such writs have always been tested and made returnable in term time, and judgment could not be entered until the return day of the writ. The theory was, that the judgment was actually pronounced by the court on the coming in of the writ and inquisition. But this fiction has been entirely overthrown by the statute which provides that judgments may be entered and

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perfected in vacation. (*Stat.* 1840, p. 334, § 23.) To give full effect to this statute we must either permit writs of inquiry to be made returnable in vacation, or allow the judgment to be entered before the return day of the writ. We see no solid objection to either course, and this judgment is consequently regular.

Motion denied.

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WHITNEY vs. COOPER.

A person bringing an action in the name of another is liable under 2 R. S. 515, § 47, 2d ed. for the costs recovered against the nominal plaintiff, though his interest in the demand prosecuted is only by way of *mortgage* or *lien*.

The person thus sought to be charged may show by parol the real nature of his interest, in contradiction of the terms of a written assignment to him, absolute on its face.

No third person can be subjected to costs under the above statute, whatever may be the nature of his interest, and however much he may have interfered in the action, if, in truth, he is not chargeable with having *brought it*.

One may be said to have *brought the action*, within the meaning of the statute, who has retained the attorney for that purpose, either individually or in conjunction with others, or sanctioned the act of an assumed agent in retaining him, or agreed to indemnify the nominal plaintiff for the expenses consequent upon the retainer.

*R. J. Hilton*, for the defendant, moved for a rule that Jacob Berringer pay the defendant his costs which he had recovered against the plaintiff in this cause by the judgment of this court. He read affidavits showing that the demand for which this suit was brought had been assigned to Berringer, and nominally to Barent P. Staats jointly with Berringer before this suit was brought; and that Berringer had, according to his admissions, participated in its prosecution for his own benefit. The assignment was absolute in its terms, signed and sealed by Whitney, and attested by one Thayer, as a subscribing witness. The attorney for the plaintiff had, soon after the assignment was

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executed, served the defendant with a notice of it; adding, that Staats and Berringer were the sole owners.

It appeared that Staats' name was inserted as assignee without his consent or knowledge, at the instance of James Gourlay, the latter intending that Staats should take as trustee for him, (Gourlay,) to whom Whitney was indebted. But Staats declined to accept or act under the assignment.

The claim of Whitney, the plaintiff, against the defendant, was \$715, and was believed to be sufficient to pay what he owed both Gourlay and Berringer; perhaps more. The claim of the latter against Whitney was only \$120. Gourlay's was from \$300 to \$500. The cause was heard before referees, Berringer having been present some part of the time; and the defendant obtained a report in his favor, recovered his general costs, they being taxed at \$262.

Whitney stated in an affidavit made in behalf of the defendant, that Berringer and Gourlay ordered the suit to be commenced, and had given directions as to conducting it. The assignment had been left with the plaintiff's attorney.

*N. Hill, jr.*, contra, read an affidavit of Whitney, made in behalf of Berringer, not contradicting but professing to explain, in some respects, the affidavit he (Whitney) had made on the other side; and stating that that affidavit had been pressed upon him by the defendant's attorney, without giving him due time to take advice on the subject. He now stated, that the only advance Berringer had, to his knowledge, made for carrying on the suit, was a loan to him of \$17. He added, that the assignment was not accepted by Berringer in payment of his demand, nor did he advance any thing as a consideration beyond his debt.

An affidavit of Berringer himself was also read, denying that he had retained the plaintiff's attorney, or directed this suit to be prosecuted; and also denying that he had ever participated in its prosecution. He stated, that the assignment had been drawn up by the plaintiff's attorney

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under directions from him (Berringer) so to frame it as to give him a lien on the moneys to be recovered, to the extent of his claim which was only \$120. And he supposed it had been so drawn, and not as conveying an absolute interest. He explained and limited his alleged participation in the suit and his advance of money, to mere inquiry as to the progress of the suit, and on one occasion lending \$17 to the plaintiff in order to defray an occasional expense. He denied that he attended the reference, except on one or two occasions, when he was there as a spectator merely.

The affidavit of one Kingsley was also produced, showing that Whitney acted in retaining the attorney and bore a principal part in conducting the suit; also tending to confirm Berringer's statement that he was present at the reference merely as a spectator.

To take from the force of Berringer's admissions, on which much of the defendant's proof tending to connect him with the suit, depended, and also to account for the form in which the assignment was drawn, a deposition was produced showing that he was a German, and spoke and understood the English language quite imperfectly.

*By the Court, COWEN, J.* Looking through the evidence, I am inclined, on the whole, to give the transaction in regard to the assignment about the same legal effect as Berringer claims for it in his affidavit. Staats, who was made the nominal assignee for the benefit of Gourlay, absolutely refused to accept the assignment; and I do not see how any interest passed beyond what Berringer took under it for the purpose of securing his \$120. It is true, the assignment was absolute on its face; but Berringer says it was not intended with regard to him, as any thing more than the creation of a lien to secure his claim. The demand of the plaintiff against Cooper was considered a large one; and the assignment as to Gourlay utterly failing of any effect by the refusal of Staats, it would have been

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inequitable, had the whole claim been recovered, to say that Berringer should have taken the whole. The assignment certainly could not have been understood, as between Berringer and Gourlay, to mean what it imports on its face—the absolute conveyance of the whole claim against Cooper in equal moieties to them, while their demands against the plaintiff were so very unequal. It must, as between them, have been intended to apportion the avails according to the amount of their respective claims. It was doubtless also intended that any amount over and above both, should be refunded to the plaintiff; and as it turned out that the assignment for Gourlay's benefit was frustrated, it cannot, with any color of propriety, be considered as in effect creating any thing more than a mere lien for Berringer's benefit, he to hold the balance over and above his claim as a trustee for the plaintiff. The assignment, although absolute and under seal, may yet be shown by parol to have been a mere mortgage or collateral security. This has often been holden in respect to a deed conveying lands and choses in possession; and in *Miller v. Franklin*, (20 *Wendell*, 630,) the same thing in principle was allowed in respect to an absolute assignment of a chose in action.

The assignment thus enuring as a mere lien in the hands of Berringer, and taking it that he brought the suit, is he liable to pay the defendant's costs? The statute makes not only the simple assignee liable, (*and vid. Norton v. Rich*, 20 *John. R.* 475, *Schoolcraft v. Lathrop*, 5 *Cowen*, 17,) but "any person beneficially interested in the recovery in such action." (2 *R. S.* 515, 2d ed. § 47.) These terms, I am of opinion, extend to every person who holds an interest by way of mortgage or lien in the chose in action. A person may be so liable in consequence of being beneficially interested as a *cestui que trust*, without being either a partial or total assignee; (*Colvard v. Oliver*, 7 *Wend.* 497;) and the clause cited from the statute might be satisfied by stopping there. The ordinary import of the words, however, I think takes in every such vested interest as the courts of law will protect against the interference of

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the nominal party. And it has long been settled that they will so protect a mere lien. (*Martin v. Hawks*, 15 *John. R.* 405.) I do not perceive any thing in *Miller v. Franklin*, which is incompatible with such a construction. The allowing of assignees to go free, because the general interest may not be in them, would enable them so to frame the contract of assignment as to evade liability for costs; while, by prosecuting and maintaining the suit, they can acquire all the substantial benefit of an absolute assignment.

Thus there is no material difference between the effect of Berringer's interest, whether we take it as he would have it, or as the defendant seeks to infer it from his affidavits.

Then, did Berringer *bring this suit*, within the meaning of the statute? The *bringing of a suit*, may be by retaining an attorney for the purpose, either alone or in conjunction with others, or recognizing a retainer made by an assumed agent, or actually engaging to defray the expenses of the nominal plaintiff retaining an attorney in his own name, he alone being liable to the attorney in the first instance. But in the attempt thus to identify Berringer with this suit, the affidavits on the side of the defendant are far from being distinct, not excepting that of Whitney. The amount of one affidavit (Dr. Staats') is, that Berringer being urged to discontinue the suit, persisted in carrying it on, and in proceeding therewith. Another, (Gourlay's,) that Berringer accepted the assignment, and admitted that he had advanced money to carry on the suit, and he was present at the hearing before the referees. Mr. Hilton deposes also that Berringer was present before the referees, and appeared to take an active part in the prosecution.

What acts took place, or what declarations were made, which amounted in Dr. Staats' mind to a *persisting in* and *carrying on* of the suit? I lay out of view any general declarations by Berringer that he was assignee, and that the suit was brought for his and Gourlay's benefit; for they do not exclude the agency of Whitney as the real party, nor are they incompatible with Berringer's being a mere

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anxious inquirer into the prospects of the prosecution, on account of his lien. Indeed, the proof adduced by the defendant is throughout very general, not to say equivocal; while on the other hand, it is positively denied by Berringer that he took any part in carrying on the suit, except in the loan to Whitney of the \$17, to pay costs. He denies that he was present at the reference, except for a part of the time, and then merely as a spectator. That portion of his acts and general declarations which are spoken to the most strongly, is not only put forward in general terms, but is spoken to by witnesses who themselves stand *prima facie* liable for the costs; and so, interested to bring in Berringer to the relief of themselves, while the imperfect manner in which he speaks English detracts still more from the force of such evidence.

Whitney, the plaintiff, is unable to say any thing more than that Berringer ordered the suit to be brought, and gave directions. That he retained the attorney, the plaintiff does not say; and he also is interested in bringing the costs upon Berringer. The plaintiff is insolvent, but if Berringer can be fixed, it will at least save the plaintiff much trouble, and probably be equal to his entire discharge. Berringer himself denies that he retained the attorney, or ever did any act which can amount to a bringing of a suit within the meaning of the statute. What words the plaintiff considers an order to bring the suit, or to whom they were addressed; whether they might not have been a mere request to the plaintiff that he would bring the suit at his own expense, he does not say. Berringer testifies that the plaintiff was the man who retained the attorney and conducted the suit.

By the affidavit of Kingsley, it appears that the plaintiff was himself the active man; that he retained the attorney, and was decidedly busy throughout in conducting the suit. Kingsley also confirms Berringer, that his presence at the reference was rather as a spectator than a party. The plaintiff admitted to Kingsley that the money advanced by Berringer was to pay the costs of adjourning the reference at the plaintiff's instance.

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Ayrault v. Houghtailing.

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That a person having a lien for his debt on a chose in action, occasionally inquires as to its progress of the attorney who holds it for prosecution, admits himself to be interested, and advises and urges the suit, are not of themselves enough to charge him with the defendant's costs.

On the whole, it is not to be denied that the defendant had much color for making this application; but he has not established that clear and satisfactory case upon which I feel warranted in charging Berringer, against his absolute denial of all liability, and the circumstances by which his denial is fortified.

Motion denied, without costs.

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AYRAULT vs. HOUGHTAILING and others.

Proof of service of papers on an agent or a clerk of court, is *prima facie* sufficient, without expressly showing the special circumstances required by rule 8th as constituting a proper case for such service.

A. Taber, for the defendants, moved to set aside the default and subsequent proceedings for irregularity, on the ground that the default was entered after the service of a plea. He read an affidavit of the defendant's attorney stating the service of a plea in due season upon the clerk of this court, as agent for the plaintiff's attorney, but there was no proof that the attorneys for the respective parties resided either in different counties, or more than forty miles from each other in the same county.

N. Hill, jr. contra, objected that a case for service on an agent must be shown, before the service could be held good.

COWEN, J. On principle, I should think that to be necessary. As a general rule, service must be made on the attor



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ney, but an exception is made by rule 8th, where the attorneys for the respective parties reside in different counties, or more than forty miles from each other in the same county. The practice is general, that where you show a special service out of the ordinary and primary way, because it is justified by any particular circumstance making an exception, such circumstance must be shown. Service on an attorney's clerk, or in his office, or on some one of his family, are familiar instances. So the service of process in all the courts is primarily personal, but often there are secondary modes. When these are resorted to, the circumstances justifying them must always be stated.

It is said, however, *quod communis error facit jus* ; and that the practice has always been different in proving secondary service upon an agent. I will inquire of the other judges how that may be. I find no precedent nor rule of practice in any book one way or the other.

At a subsequent day, COWEN, J. said : I have inquired of the judges, and none of us remember an instance where, in proving the service of papers on an agent or a clerk of court, it has been thought necessary to show the reason. Simple proof of service by affidavit, or by admission of the person served, has always been held *prima facie* sufficient. The motion must therefore be granted, with costs.

**Rule accordingly.**

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 Williams v. Cooper.
 

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### WILLIAMS vs. COOPER.

A defendant in an action of slander, under the impression that he had no evidence to justify the words charged, pleaded the general issue; but, afterwards discovering such evidence, he applied to the court and had leave to amend by adding a plea of justification.

Where, in slander, the words charged in the declaration imported that the plaintiff was a thief, and had *stolen the defendant's apples*: HELD, that the plaintiff could not be allowed to amend by adding words accusing him of *stealing boards*, and which, though spoken before the suit was commenced, did not come to his knowledge till long afterwards; especially, as the right of action therefor had become barred by the statute of limitations.

But, *semble*, the court will allow even a *new cause of action* to be added to the declaration by way of amendment, provided the suit was intended to embrace it, and it was omitted in declaring through a mistake of the pleader; and this, whether the statute of limitations has since closed upon it or not.

Slandorous words charging the plaintiff with having stolen a particular thing, cannot be introduced into a declaration for words importing a charge of theft generally, under the notion of merely amending a *variance*; for they constitute distinct causes of action.

**AMENDMENT**, in slander. The words charged in the declaration imported that the plaintiff was a thief, and had stolen the defendant's apples, to which the defendant, supposing he had no evidence of justification, pleaded the general issue. Afterwards, discovering evidence by which he believed he could justify the words, he moved for and had leave to amend, by adding a plea that the words were true.

The plaintiff, at the same time, moved to amend his declaration by adding words which imported a stealing of boards; words which he did not know of when the suit was brought, and an action for which was now barred by the statute of limitations; though not when this suit was brought.

*L. J. Walworth*, for the plaintiff, cited 1 R. L. of 1813, 117 to 122, and 2 R. S. 343. Also 20 Wen-

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*dell*, 668; 6 *id.* 506; 12 *id.* 228; 7 *T. R.* 51; 6 *id.* 543.

*R. Cooper*, contra, cited 1 *Cowen*, 136; 1 *Wendell*, 93; 12 *id.* 228; *Gr. Pr.* 530, 1st ed.; 1 *Hall's Rep.* 165.

*By the Court*, COWEN, J. I have looked into the books cited, and think I could have allowed the proposed amendment, had its purpose been to obviate a variance between the declaration and the cause of action for which the action was really brought; or to introduce a new cause of action for which it was so brought, but which had been omitted by the pleader through mistake. The delay which has intervened would have been no objection to either; though the statute of limitations might have closed upon the matter sought to be introduced. Indeed, I will not deny that the latter circumstance might even strengthen the argument for allowing the amendment.

But here it is proposed to add a distinct substantive cause of action, not known to the plaintiff when the suit was brought, and of course not intended to be declared upon. This withal is barred by the statute. That would be going farther than any case warrants. It would be to avoid the statute by a suit which did not in fact, nor was intended to cover the cause of action against which it has run. Courts are more liberal in allowing the addition of new demises in ejectment, perhaps, than any other sort of amendment. Indeed, that is, generally, no more than the modification of the declaration, so as to reach the real question intended by the suit. Yet where the title of the proposed lessor appeared to have been barred by the statute, this court denied the motion for such an addition. (*Jackson, ex dem. Harris, v. Murray*, 1 *Cowen*, 156.)

It is said that the words sought to be added here are not new and distinct; that one charge in the declaration is of words importing that the plaintiff was a thief, and the addition that he stole boards, is but another mode of charging the same thing. Generically this is so; but specifically

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Ex parte Ives.

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not; and a plea justifying the former words might not reach the new ones. I think the allowing of these must be considered much more than amending a mere variance; and that they are distinct words within the rule of the cases disallowing amendments by adding a new cause of action.

It is supposed that the 2 R. S. 343, § 1, enlarges our powers to amend; but this section is merely in affirmance of the old practice. (*Trinder v. Durant*, 5 Wendell, 72.)

Motion denied.

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Ex parte Ives.

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There is no provision in the law for a concurrent redemption of lands sold on execution, by two different creditors holding judgments docketed at the *same instant*; but the one first complying with the terms for redeeming from the purchaser will be entitled to the sheriff's deed, unless the other creditor redeems from him; and this, though the judgments were docketed under a stipulation that any sums collected thereon should be shared by the creditors in proportion to the amount of their respective judgments.

One creditor redeeming from another, under such circumstances, is bound to tender the *amount paid by the latter, with interest thereon*; and where he merely tendered the *amount of the original bid*, with interest on that, *held*, insufficient.

REDEMPTION of lands sold on execution. Motion in behalf of Ives, for a peremptory mandamus, on a case agreed, to be directed to the sheriff of Rensselaer county, commanding him to execute a deed to Ives of certain lands sold under a *fi. fa.*, and which Ives had sought to redeem.

There were three judgments against Hedges & Mulford, all docketed at the same hour, October 24th, 1839; one in favor of Bell, one in favor of Miter, and another in favor of Clark. The plaintiffs, at the same time, agreed in writing, "that whatever sum or sums shall ever be paid, received, collected or realized upon said judgments, or either of them, or for or on account of said judgments, or either

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Ex parte Ives.

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of them, shall be applied and paid on said judgments in proportion to the respective amounts thereof."

Previously, viz. September 27th, 1839, House and others had a judgment against Hedges, docketed that day, under a *fi. fa.* upon which, the sheriff, on the 11th April, 1840, sold the premises in question.

April 10th, 1841, the two judgments of Bell and Clark were assigned to Ives, the relator; and on the 22d he redeemed under them, paying the original bid and interest, being \$430.

July 10th, 1841, Miter offered the sheriff to redeem under his judgment, and paid \$435, the amount of the original bid and interest to that time, demanding a deed of the whole premises, "or of such proportionate part and share thereof, as he was entitled to by virtue of said stipulation and of said redemption, in case any redemption of said premises had been made by the said Bell and Clark or either of them."

July 13th, 1841, after fifteen months from the day of sale, Ives demanded a deed of the whole, which the sheriff declined to execute.

*S. Stevens*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. . It is agreed that the statute nowhere provides expressly for a concurrent redemption by, and apportionment among, different creditors holding judgments docketed at the same instant. And the stipulation entered into by these three, does not vary the case. There is no provision by it in regard to terms of redemption; and if there were, we could not compel a specific execution by writ of mandamus. After a purchase at sheriff's sale, any creditor, either senior or junior, or the assignee of such creditor, may redeem on paying the purchaser's bid with interest. (2 R. S. 294, § 51, 2d ed.) This, Ives did, he being assignee of Bell and Clark, junior creditors. Then, their being no special provision for a

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Ex parte Ives.

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creditor whose docket was made at the same time with this, the terms on which Miter could redeem seem to be prescribed in section fifty-five, subdivision one. This declares, that one creditor having redeemed from the purchaser, any other who might have redeemed from the same purchaser, may still take the redeeming creditor's right, on reimbursing the sum paid by him with interest on that. By subdivision two, no more need be paid, unless the lien, in virtue of which the first creditor redeemed, be *prior* to that of the creditor who comes to redeem from him. In such case he must be also paid the amount of the lien in virtue of which he redeemed. This restraint cannot, that I see, be applied in favor of Ives' claim, simply because it was not *prior* to Miter's. I doubt whether the rule in *Adams v. Dyer*, (8 John. R. 347,) and *Waterman v. Haskin*, (11 id. 228,) can be so applied to this case as to place Ives in the position of a senior creditor, although, having an equal right with Miter, he came first to redeem. But it is not necessary to decide that question. If Miter had a right to redeem, as he claims to have had, under subdivision one, of section fifty-five, he should at least have offered what *Ives had paid*, \$430, with interest, whereas he merely offered *the amount of the original bid, and interest on that*. It is said, he offered his own share of the original purchase money, and more too; and is at least entitled to a deed in proportionate shares with Ives. But the statute provides for no such thing; and we cannot add to it.

Whether any, and what relief, Miter may be entitled to in equity, it is not necessary to decide. It is enough to see that he comes within no provision of the statute, under which we can direct a conveyance to him, either in whole or in part. Even if an equitable intent in the statute to allow the latter, be derivable from it, we have no means by which, under a writ of mandamus, we could settle the apportionment of land for money.

A peremptory mandamus therefore follows, commanding the execution of a conveyance by the sheriff to Ives.

Motion granted.

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Davis v. Tiffany.

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DAVIS vs. S. TIFFANY.

A vendee of lands, having obtained his deed, was subsequently notified of an outstanding lien by judgment against the vendor, whereupon the vendee promised the creditor to retain a portion of the purchase money for his benefit, which the vendee did not do, but, under a belief that the vendor was in good circumstances, paid it to him. The creditor suffered the judgment to lie ten years after it was docketed, and then sued out execution, on which the lands so purchased were seized. *Held*, that the vendee's right being clear, he was entitled to summary relief, by an order for a perpetual stay of proceedings; though, *semble*, had there been doubt of his good faith, either in respect to the original purchase, or the non-fulfilment of his promise as to retaining the purchase money, the court would have allowed the creditor to sell.

The case of *Hewson v. Dygert*, (8 *John. Rep.* 333,) so far as it imports an unqualified denial of the vendee's claim to summary relief, under these and similar circumstances, is overruled.

*D. Burwell*, in behalf of G. S. Tiffany, moved for a perpetual stay of the *fi. fa.* issued in this cause against the defendant, in respect to a farm situated in that county, purchased by G. S. Tiffany of the defendant S. Tiffany, on the 26th day of July, 1831.

It appeared that the judgment on which the execution issued was perfected on the 28th day of April, 1826, on a bond and warrant intended to secure the plaintiff against a letter of credit, in consequence of transactions under which there was now due \$1456,13, on the judgment, with some interest, for which the execution issued tested the first Monday of January, 1841.

G. S. Tiffany purchased without actual notice of the judgment, paid a part down, and afterwards the remainder, the defendant being apparently in good circumstances.

*S. Stevens*, contra, read an affidavit showing that the plaintiff, before J. G. Tiffany had paid the defendant in full for the farm, gave him notice of the judgment, when he promised to keep back sufficient of the purchase money

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to indemnify the plaintiff for the sum he then stated to be due.

*By the Court, COWEN, J.* The plaintiff does not make out such a case against J. G. Tiffany as to require that I should permit a sale. I would do so, if I saw any serious doubt whether he had not purchased with a view to defraud the plaintiff, or had paid the balance in bad faith, which he promised to keep back. I would do so, in order that the question of fraud might be put in a train for determination by a trial at law, or a hearing on a bill in equity. But the good faith of the original purchase is not denied; and the promise to retain a part was made before the judgment had ceased to be a lien by the lapse of ten years. No court would hold that this farm was, under the circumstances, bound by the judgment after that time had elapsed. This being clear, we are warranted, though it seems formerly to have been held otherwise, (*Hewson v. Dygert*, 8 *John.* 333,) in staying the execution upon motion, on the ground that an attempt to draw the purchaser's title in question by a sale is an abuse of our process. The judgment is gone in respect to him, as effectually as it would be in respect to a defendant who has paid the money upon it in full. (*Little v. Harvey*, 9 *Wendell*, 157. *Graff v. Kip*, 1 *Edw. Ch. Cas.* 619. *Roe v. Swart*, 5 *Cowen*, 294. *Pettit v. Shepherd*, 5 *Paige*, 493. *Wood v. Torrey*, 6 *Wendell*, 562. *Tufts v. Kip* 18 *id.* 621. *Lansing v. Vischer*, 1 *Cowen*, 431.)

**Motion granted.**



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Fitzbush v. Truax.

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## FITZHUGH vs. TRUAX.

An affidavit of merits, that the party "has fully and fairly stated *the facts of his case*," &c. is insufficient; it should be that he "has fully and fairly stated *the case*," &c.

**AFFIDAVIT of merits.** The defendant's default for not pleading having been entered, he now moved to set it aside for irregularity; but failing in that, he asked to be let in on terms, upon an affidavit of merits setting forth that he had "fully and fairly stated *the facts of his case*," &c. and then going on in the usual form.

*W. S. Bishop*, for the motion.

*A. P. Grant*, contra.

*By the Court*, COWEN, J. The affidavit of merits is insufficient. It is, that the defendant *has stated the facts of his case*, whereas it should be, that he has stated *the case*, &c.

Motion denied.(a)

(a) See *Rule 61st, ed. of 1837*; and also *Rule 1st of May T. 1840*, (22 *Wend.* 644.) The affidavit may be, that the party has stated *this case*, or *his case*; but not that he has stated *his defence*, &c. (*Brownell v. Marsh*, 22 *Wend.* 636.) Nor will it do to qualify the phraseology, by adding, "*so far as the facts have come to his knowledge*," or in any other manner, unless a sufficient excuse therefor be expressly shown. (*Brown v. Tousey*, 19 *Wend.* 616.)

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Church v. Cole.

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**CHURCH vs. COLE and others.**

The plaintiff may bring an action on a judgment, though time enough has not elapsed since it was entered to entitle him to a *fi. fa.* thereon pursuant to the act of May 14th, 1840.

MOTION in behalf of the defendants, for a rule that the proceedings on the part of the plaintiff be stayed, or that the plaintiff discontinue, with costs.

The action was debt, on a judgment in assumpsit. The motion was founded on the fact, that the action had been brought within the thirty days allowed to the defendants by the statute, (*Sess. Laws of 1840, p. 334, § 24,*) before the plaintiff would have had a right to his *fi. fa.*

*E. D. Smith*, for the motion, said, that the court would stay proceedings in debt on a judgment pending a writ of error, because it is a *supersedeas* of execution; and he contended this case was like that. (*Vid. Gr. Pr. 951, 2d ed., and the books there cited.*)

*W. S. Bishop*, contra.

*By the Court*, COWEN, J. The two cases are not parallel. To stay execution by writ of error, bail must be given. The statute in question stays it without. Beside, the statute is in derogation of a common law right; and should not be enlarged by construction. The motion must be denied with costs.

Rule accordingly.

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**Ryers v. Hedges.**

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**RYERS and others vs. HEDGES.**

**Whether a landlord, defending an ejectment in the name of his tenant, will be liable for the costs recovered by the plaintiff, *quere*.**

**Where the alleged landlord, on a motion to compel him to pay the plaintiffs' costs, admitted that he claimed title to the premises, and had aided in the defence, but showed by his own and other affidavits that he aided merely as counsel, the court denied the motion.**

**As a general rule, though one person, for the protection of his own interest, defend an action in the name of another, he will not be liable for the plaintiff's costs.**

**Where a motion was opposed on an affidavit made by one who had refused to testify for the moving party, the court denied the latter a commission to compel the witness to be examined pursuant to 2 R. S. 457, 8, §§ 24, 25, 2d ed., on the ground that the affidavit was full to the merits of the motion, and showed that a further examination would be useless.**

**And, *semble*, a commission will be denied under such circumstances, if the adverse party produces the witness' affidavit *touching the matters in question*; for it will be presumed that he has told the *whole truth*, till the contrary appear.**

***H. Welles*, for the plaintiffs in ejectment, moved for a rule that one Bogert pay the plaintiffs' costs of prosecuting this cause to judgment, on the ground that the defendant had been before and during the pendency of the suit, the tenant of Bogert; and that the latter had defended the suit in his name.**

**In addition to affidavits tending to show the existence of the tenancy, it appeared that the defendant had been committed under a *ca. sa.* for not paying the costs; and, while in prison, had admitted the tenancy, and that Bogert had defended the cause through him, claiming title; but had refused to make any affidavit in order to aid this application.**

***M. T. Reynolds*, contra, read affidavits, and, among others, the affidavit of Hedges and Bogert, denying the tenancy and affirming that Bogert, though he had claimed title and aided in the defence, had not done the latter in any other capacity than as counsel for Hedges. Hedges**

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Ryers v. Hedges.

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had been discharged from imprisonment under the insolvent act.

*Welles* insisted, that the affidavits on the part of the defendant did not explicitly meet the allegations in the plaintiffs' affidavits; that the motion should, therefore, be granted; or at least this court should order Hedges' examination under a commission.

*By the Court, COWEN, J.* It must be taken as a general rule since our decision in *Miller v. Adsit*, (18 *Wendell*, 672,) that though one person, for the protection of his own interest, defend an action in the name of another, yet he will not be liable for the costs which the plaintiff recovers. The action of ejectment, where the landlord defends in the name of his tenant, has been holden to constitute an exception; (*Jackson, ex dem. Martin, v. Van Antwerp*, 1 *Wendell*, 295;) but this is contrary to the principle of *Miller v. Adsit*. In the case at bar, however, the relation of landlord and tenant is denied to exist by the affidavits both of Bogert and Hedges. Their denials too are somewhat fortified by other affidavits; so much so that I think the affidavits on the side of the plaintiffs are met too strongly to warrant us in granting this motion upon the present state of the proofs.

But it is insisted that Hedges having formerly admitted the tenancy, &c. we ought to order a commission and compel his examination in behalf of the plaintiffs pursuant to the 2 *R. S.* 457, 8, 2d ed. § 24, 5. But this, according to the act, is to be done only where a witness has declined to testify voluntarily. Hedges has, in this case, made a voluntary affidavit touching the matter in question, upon the request of Bogert; and we must intend has told the whole truth. At any rate, we must presume, after what he has sworn, that his deposition would be of no use to the plaintiffs.

Motion denied

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Livingston v. Clements.

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**LIVINGSTON vs. CLEMENTS.**

Where an ejectment suit was defended in the name of a tenant, at the instance and for the benefit of his landlord, the court refused, on motion of the tenant, to compel the landlord to pay the plaintiff's costs; especially, as the facts on which the motion rested were rendered doubtful by counter affidavits.

*Semble*, that a landlord defending a suit in the name of his tenant will under no circumstances be ordered to pay the costs recovered by the plaintiff; and that the case of *Jackson, ex dem. Martin, v. Van Antwerp*, (1 Wend. 295,) *contra*, has been overruled.

*C. Stevens*, for the defendant, moved for a rule against one Polly, that he pay the plaintiff's costs of this suit. The action was ejectment for land in the defendant's possession, and Stevens read an affidavit of the defendant, that Polly claiming title, the defendant at his request continued in possession and defended, on the faith of Polly's promise to indemnify him. That he should not otherwise have defended. That the plaintiff had recovered, and caused the defendant to be imprisoned in virtue of a *ca. sa.* for the costs. The defendant also stated that he defended as the tenant of Polly, and it appeared that the latter had admitted the tenancy to Mr. Perkins, the attorney who defended the cause.

*M. T. Reynolds*, *contra*, read Polly's affidavit denying the tenancy; and another, showing the defendant's admission, while in prison, that Polly had never agreed to indemnify him.

*By the Court*, COWEN, J. This case, as it stands between the plaintiff and Polly, would, on the affidavits of the defendant, be the same with *Jackson, ex dem. Martin, v. Van Antwerp*, (1 Wend. 295;) that is to say, Polly would be liable to pay the plaintiff's costs on his motion. Then it is insisted that he may be compelled to do the same thing upon the defendant's motion, for which we are referred to

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 Burt v. Mapes.
 

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*Colvard v. Oliver*, (7 *Wend.* 497.) The principle of the latter case would seem to be a warrant for this motion, on the defendant's facts, if we could go behind the nominal defendant and consider another, defending in his name, as the real party for the purpose of compelling the latter to pay costs on the application of the plaintiff. I should doubt whether we could, even were the landlord, who defended in the name of his tenant, called on. *Jackson v. Van Antwerp* does not appear to be sustained by any precedent; and is I think, in principle, overruled by *Miller v. Adsit*, (18 *Wend.* 672.)

But it is enough to say, that the facts here sought to be shown by the defendant's affidavits are denied by Polly, and his denial fortified by the defendant's admission. The proofs of the two parties now litigating, are nearly of equal strength. This renders it an unfit case to be disposed of summarily. The defendant should be put to his action.

Motion denied.

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 BURT vs. MAPES.
 

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A defendant in ejectment obtained an injunction from chancery against the further prosecution of the suit, whereupon the plaintiff discontinued it, and instituted a new ejectment for the same matter, in which he obtained judgment by default; held, that the existence of the injunction formed no ground for treating the default as irregular, or for ordering a stay of the plaintiff's proceedings.

This court has no power to aid in enforcing an injunction against proceedings at law, and can take no notice of the injunction, except as a ground for relieving the party enjoined from the effect of delay, or the omission of some necessary step in the cause.

The case of *Hoyt v. Gelston*, (13 *John. Rep.* 139,) reviewed, and some of its dicta disapproved.

A. Taber moved, in behalf of the defendant, for a rule staying all proceedings on the part of the plaintiff, until a chancery suit in the 6th circuit should be decided, in which the present defendant had filed a bill, and obtained an injunc-

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Burt v. Mapes.

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tion against the plaintiff. The present suit was an action of ejectment. The plaintiff had brought a former ejectment for the same premises, and on the same legal title drawn in question by this suit, against the same defendant; whereupon the defendant filed his bill on the ground of an alleged equity, and obtained an injunction. The plaintiff then discontinued that suit, and commenced and proceeded in the present.

*P. Cagger*, contra, read an affidavit tending to justify the plaintiff in bringing the second suit, notwithstanding the injunction. It appeared by this affidavit that the plaintiff had taken judgment by default in the second suit, and one branch of the notice of this motion proposed to set aside such judgment as irregular, should it appear in any way that a default had been taken for want of a plea.

*S. Stevens*, same side.

*By the Court*, COWEN, J. No legal merits are sworn to in the defendant's affidavit; and if we set aside the default, it must be on the ground that the proceedings in this cause are irregular by reason of the injunction. But this was not much insisted on by the counsel for the defendant. Where the defence is hopeless at law, and based entirely upon equitable considerations set up in a bill for an injunction, it is, in general, proper, that the suit at law should proceed to judgment, in order that the plaintiff may at once have execution according to his legal right, if the defendant should ultimately fail to establish the alleged equity. Indeed, the injunction itself almost uniformly provides that the suit may so proceed. (*Rule 33 of N. Y. Chancery.*) It is difficult to see from the papers before us, why the injunction in question did not contain such a provision. It seems, however, not to have done so; and had the defendant sworn to merits, we might have allowed the state of things in chancery as an excuse for not pleading, and let him in on terms. We can not, however, regard the injunction as, *per se*, ren-

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Burt v. Mapes.

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dering the plaintiff's proceedings irregular, like the order of a judge or commissioner.

As to staying proceedings, no case is produced wherein the courts of law have lent their aid to enforce injunctions from chancery, nor am I aware of any. In *Hoyt v. Gelston*, (13 *John.* 139,) an application was made to set aside a verdict which was alleged to have been taken in violation of an injunction; but the writ appeared to have been dissolved, and the motion was denied for that reason. It is true, the court go on to say that, as a general rule, they would notice an operative injunction, for the purpose of promoting the ends of justice, and of preserving harmony between the courts. With the greatest deference, however, I should think any notice which we can take of an injunction as influencing our own practice in the cause to which it relates, would rather constitute an exception than a general rule. We should of course allow it, under circumstances, as an excuse for delay, or for omitting some step in the cause; and so save the party enjoined from the effect of forbearing to sue out execution, from a default or judgment of *non pros*, or judgment as in case of nonsuit, &c. (*Vid. Tidd's Pr.* 318, 319, 327, 328, 625, 1006, *Am. ed.* of 1807. *Mitchell v. Cue*, 2 *Burr.* 660. *Eden on Inj. Am. ed.* of 1839, p. 163 to 166. 3 *Woodd. Lect.* 398. *Powis v. Powis*, 6 *Moor.* 517. 2 *R. S.* 282, 2d ed. § 5.) But we can not receive it as rendering proceedings irregular, because contrary to it; and above all, cannot enforce it in the manner we are now called upon to do. The act of bringing the second suit was either a violation of the injunction, or it was not. If a violation, the vice chancellor has power to administer the appropriate redress, while we have not. If it be not a violation, of course neither court should interfere.

There are several considerations of expediency which forbid our interference by way of enforcing an injunction. When the chancellor is called on to aid the courts of law he has the means of inquiring into the merits of the application, and rendering his aid efficient. But we have no



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**Ontario Bank v. Walker.**

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such means with respect to proceedings in his court. The injunction depends on facts to be collected from bill and answer; it is commonly temporary, and its continuance dependent very much on his discretion. Though in force to-day, it may be dissolved to-morrow, and a stay here till the suit before him is ended, might come in direct collision with his purpose. To order a stay till he should dissolve the injunction, would be an act of very little use, to say the least, while the propriety of doing so on the merits, might often be very difficult of settlement upon a motion made here.

It is many times a nice question, whether the injunction have been violated or not, depending on a reference to voluminous papers which can not be examined here, nor even seen by us perhaps in their proper connection; at all events, not without great expense to the parties. The decisive objection is, however, that our assistance is not required by the chancellor, because his power to enforce an injunction and render it effectual to its proper end, is, in all respects, complete, while ours is unknown, and must remain so unless we are prepared to usurp a new jurisdiction.

Motion denied.

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**ONTARIO BANK vs. WALKER and others.**

Where a judgment was recovered and execution issued against the maker and several endorsers of a note, among whom was R., a mere accommodation endorser, who paid the judgment; *held*, that the court had no power to permit R. to sue out execution against the parties to the judgment who stood prior to him on the note.

A surety who pays a judgment recovered against him and his principal, is entitled, in equity, to be subrogated to the creditor's means of enforcing collection; but, at law, the payment extinguishes the judgment, and the surety's only remedy is by a suit and recovery over.

**SUBROGATION.** The action was on a note made by F W Walker, payable to the order of M. Walker, and en

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Ontario Bank v. Walker.

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dorsed successively, 1st by M. Walker, 2d by I. Harris, 3d by S. B. Roberts, and 4th by A. Blair. Judgment having been obtained against all these parties, and execution issued, Roberts paid the money to the sheriff, after the latter had seized his (Roberts') personal property.

A motion was now made, in behalf of Roberts, that he be permitted to sue out execution on the judgment against the parties on the note who stood prior to him. His affidavit was produced, that he was a mere accommodation endorser. He added, that he had commenced a suit against the prior parties, which was defended.

*Stryker & Comstock*, for the motion.

— — — — —, contra.

*By the Court*, COWEN, J. If Roberts be a surety, he may perhaps, on showing a proper case, be substituted by chancery in the place of the bank, and allowed to take the remedy he now asks at our hands. In law, however, the judgment is extinguished by the payment; and he can only have a suit to recover over against the prior parties. The very reason why chancery performs the office of subrogation, in favor of a surety who has paid, is, because, the debt being extinguished, a court of law cannot do it.

Motion denied.(a)

(a) The dictum of Marcy, J. in *The New-York State Bank v. Fletcher*, (5 Wendell, 85, 89,) must therefore, it seems, be understood in reference mainly to the powers of chancery.

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Foot v. Morgan.

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FOOT vs. MORGAN.

A justice of the peace whose wife is the sister of A.'s wife, cannot take jurisdiction of a cause in which A. is the *plaintiff in interest*, though prosecuted in the name of another ; and if he render judgment therein, it may be treated as absolutely void.

Such relationship between the plaintiff and a juror, constitutes a ground of challenge for affinity.

And if the sheriff is thus related to the plaintiff, it is cause for challenge to the array

JUSTICE's jurisdiction—affinity to the party. A motion was made to set off a judgment in favor of the defendant, obtained in the name of H. M. in a justice's court, against a judgment rendered in favor of the plaintiff in this court. The motion was opposed on the ground that the justice's judgment was void for want of jurisdiction ; and an affidavit was produced showing that Morgan, the now defendant, was the real plaintiff before the justice, and was related to the justice ; the said Morgan and the justice having married sisters, and both their wives being alive at the time of the commencement of the suit before the justice and the rendition of the judgment therein. It appeared that Morgan recovered the judgment before the justice in the name of H. M. his brother, but that the brother had no interest in it.

*M. T. Reynolds*, for the motion.

*David Wright*, contra.

*By the Court*, COWEN, J. It was said by counsel in behalf of the motion, that a party and juror having married sisters, would be no cause of challenge : but I presume hastily ; for it is put among the commonest cases in the books, as an instance of affinity which disqualifies. It was holden very early, on writ of error to parliament, that the sheriff's wife being sister to the plaintiff's wife, was good cause of principal challenge to the array. (*Markham v. Lee*, cited in *Mounson and West's case*, 1 Leon. 89. *Vid. Cain v. Ingham*, 7 Cowen, 478, 9, and especially the note

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*Ex parte Persons.*

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to that case.) The same thing is mentioned as the cause of challenge to a juror. (*Tr. per pais*, 188, *Lond. ed. of 1766*. 2 *Rol. Abr.* 654, *pl.* 17, *S. P.*) By 2 *R. S.* 204, 2d *ed.* § 2, no judge can sit who is of such affinity to either party that he might be challenged as a juror; and the statute extends to a justice sitting on the trial of a civil cause. (*Edwards v. Russell*, 21 *Wend.* 63.) The judgment rendered by him is there said to be void. It is *coram non judice*, and may be questioned collaterally. There can be no doubt that the statute extends to the party beneficially interested, as well as the real party. The objection to the set-off is fatal, and the motion must be denied.

Rule accordingly.

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*Ex parte PERSONS.*

A town board of excise, until the *actual entry* of a resolution pursuant to 1 *R. S.* 677, § 3, 2d *ed.*, have a large discretion to exercise on the question of granting and refusing licenses, which this court will in no case attempt to control.

*A. C. Hand* moved for a mandamus to be directed to the board of excise of the town of Westport, Essex county, commanding them to enter a resolution to grant a license to the relator for keeping a tavern in that town, and to sign such license, pursuant to 1 *R. S.* 676, 2d *ed.* The motion was founded on affidavits tending very strongly to show, that the relator was in every respect a fit person, within the statute, to receive a license to keep a tavern at his residence in the village of Westport, and in the house proposed, at which he had kept a tavern under regular licenses for several years; and that all this was known to, and admitted by the board, on his application to them for a license. Yet, on applying and offering the proper bond, they refused to enter a resolution pursuant to § 3 of the act, or to grant the license, though they all knew the fact that no

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*Lusk v. Hastings.*

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whether a judgment being in his favor, the power is prolonged for all the purposes of enforcing collection.

When shall the judgment be considered as entered, for the purpose of terminating the suit? In *Macbeath v. Cooke*, which was the case of a judgment for the defendant, the court said that the attorney's authority was determined when final judgment was *signed*. (1 *Moore & Payne*, 514.) And it seems to me this cannot be said of a much earlier stage. In general, it is true, the judgment relates to the first day of the term at which, or next before the vacation in which, it is actually entered on the roll; and this may be made to speak as of that term. (*Arnold v. Sandford*, 14 *John. R.* 417, 424. *Bragner v. Langmead*, 7 *T. R.* 20.) But the cases do not allow the party to carry back the relation of a final judgment beyond that, even though the rule for judgment were several terms before. (*Bing. on Judgm.* 96.) It is said in 2 *Mallory's Entr.* 369, that "the having a rule for judgment, gives the party no power to enter up the judgment in another term, *as of the term in which the rule was granted*; but such judgment was set aside." And in 2 *Lil. Pr. Reg.* p. 143, B., it is said that till the judgment be recorded, it is no judgment. Thus, in the case of a judgment, to terminate the authority of the defendant's attorney, there must be an entry of it on the roll. This is reasonable; for unless his authority be continued to that time, the defendant has no professional assistance in seeing that the entry, if it be against him, is according to the truth, without appointing a new attorney; and if the entry is to be of a judgment in his favor, though no execution is to follow, the continuance of his attorney would be of still greater importance; for he would then have a positive duty to perform.

A rule to arrest the plaintiff's judgment, is no more the final act in the cause than a rule for judgment, as may be seen by *Bulling v. Rogers*, (*Barnes*, 278.) There the defendant prayed an entry on the roll as the adjudication of the court, *that the judgment be arrested*, which was ordered; for the rule alone would leave the action pending and plead-

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able to a new action. (*Vid. also Croswell v. Byrnes*, 9 John. R. 287.) Mr. Goodhue, the attorney in the case before us, might have caused this entry to be made; and it seems to me his power can no more be said to have terminated by force of the mere rule in arrest, than if he had taken a rule for judgment and stopped there. The plaintiff also might have desired to have the entry made, in order to avoid a plea of the pendency of this cause in abatement to the action in the common pleas; in which case, Mr. Goodhue would have had a right to interfere and see that the entry was in proper form, and such as should work no prejudice to his client. It does not appear that any such entry was ever made; and the case has, therefore, continued open for further proceeding to this day. No entry which could now be made as matter of right, even if the rule in arrest had continued undisturbed, would finish the record and displace his power as of a time farther back than the last term; or if, as seems to have been held in *Fleet v. Youngs*, (11 Wend. 522,) with respect to a judgment, we might make an entry now for the time when the rule was entered, viz. October term, 1838, we could hardly allow a mere fictitious relation to overreach the steps which the plaintiff's attorneys have, in the mean time, rightfully taken. The plaintiff might have preferred an entry of judgment against himself, in order to bring error; and such I observe was the alternative of one of his notices which he served on Mr. Goodhue. (*Vide Fish v. Weatherwax*, 2 John. Cas. 215. *Bayard v. Malcom*, 2 John. Rep. 101.) It was supposed, on the argument, that, to be available, a motion for this must have been made earlier than it was proposed. It is not necessary to pass upon that question. The two years limitation of a writ of error may have been an objection; but independently of that, I should think such a motion admissible at any time before the plaintiff is foreclosed by the entry upon the record of an adjudication in arrest. To displace Mr. Goodhue as his attorney, the defendant has been under the necessity of treating the rule for arrest of judgment as final from the day when it was entered. He

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claimed for it the same effect as a formal judgment that he go without day; and said he had a second judgment to that effect, when we declined to amend the record by the circuit judge's certificate. The answer is, that the utmost he could show, were the two rules, mere entries in the minutes of the court; and no entries on the judgment roll, or the record, which, with us, answers to it. He is certainly very strict in claiming so much, especially when we see Mr. Goodhue appearing as his attorney in one motion, after the rule for arrest had been taken. The power of the attorney seems sometimes to be retained, even after the entry of final judgment on the record, and beyond the purpose of merely superintending the collection of the debt. If a writ of error be brought against his client, it has long been the practice to require that he should be served with notice, (2 *Sel. Pr.* 365,) though this, with us, is now regulated by statute. (2 *R. S.* 498, 2d ed. § 57, 8. *Vid.* 2 *Tidd's Pr.* 1068, *Am. ed.* of 1807.) So the entry of final judgment by the defendant's attorney may be irregular. What objection is there, in such case, to serving him with notice of a motion to set it aside? It is his business at least to see that a regular judgment in favor of his client should be perfected and sustained when the court have awarded in his favor. Having conducted the suit, he is best able to resist all attacks upon the judgment. Indeed, his own regularity is generally drawn in question by the proceeding. For a similar reason he is the proper person to be served with notice, when the judgment, or any other proceeding in which he has participated, is sought to be set aside on the ground of merits, as in this instance, the rule for arrest.

On the whole, I think the plaintiff's attorneys have been regular; and though Mr. Goodhue may have believed that he had competent technical ground for disregarding the service of papers through which he was always most fully and seasonably advised of what the plaintiff was doing, there is no reason that I see for relieving from the defaults he has incurred, without the usual terms of paying costs. This I think should be done. The defendant claims to

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Lowry v. Hall

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have been taken by surprise, and evidently has been. It is impossible for me to say now finally, that the plaintiff was right or wrong, on the merits of his motion to vacate the rule for arrest, or to take his rule denying a new trial, though such merits were considerably spoken to on the argument of this motion. I think, that if they are to be considered at all, they must be brought directly before us, as they would have been on Mr. Goodhue appearing to the notices.

The motion of the defendant is therefore granted, on paying the costs of the plaintiff's proceedings since the first of January, 1840, and the costs of opposing this motion.

Rule accordingly.

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LOWRY vs. HALL.

A *notice* of special matter accompanying a plea of the general issue, will not be struck out as frivolous, if it contain what may plausibly be urged in bar of the action.

The main reason for striking out frivolous *pleas*, (*viz.* delay,) does not apply to a *notice*.

A notice, however, containing matter palpably *absurd* and *impertinent*, will be stricken out.

STRIKING out frivolous notice of special matter. Assumpsit. Common counts. Plea, general issue, with notice of evidence, in defence, that the plaintiff had obtained a warrant of attachment under the absent debtor act, (1 *R. S.* 764, 2d ed.,) to enforce collection of the same claims for which this suit was brought, or some of them; that the sheriff attached the defendant's property, who, for the purpose of discharging the warrant and obtaining restitution under the 55th section of the act, gave a bond, with sureties, conditioned to pay the debt in the words of the section, on which bond an action had been brought within six months, according to § 58. (*Vid.* 2 *R. S.* 773, 2d ed.)



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*A. Teber*, now moved to strike out the notice as frivolous.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. No doubt, we should strike out a notice entirely impertinent, and bearing plain marks of a fraud on the statute allowing this form of pleading. The notice should contain matter having some pretence to bar the plaintiff's claims, or a part of them. Notice of *liberum tenementum*, in bar of an action of assumpsit, for instance, would be struck out as palpably impertinent. But we ought not to strike out on motion, where the notice presents matter which can plausibly be urged as a defence. The main reason for striking out frivolous pleas, viz. delay, does not apply to a notice.

In this case, the notice goes on the idea that a bond, given to secure a simple contract debt, merges it. The general rule is so; and the question will be, whether the rule applies to a bond under the 35th section of the absent debtor act. (1 R. S. 773, 2d ed.) However erroneous the idea that it does may turn out to be, we cannot say that it is palpably absurd. The notice, instead of being prolix, is barely long enough to give a distinct notion of the bar.

There is no ground for the motion; and it is denied, with costs.

Ordered accordingly.

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 Ex parte Paine.
 

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### CHICHESTER vs. THE AGENT OF THE MOUNT PLEASANT STATE PRISON.

Referees are not entitled to \$3 per day for services and expenses in settling a *special report* under the 71st rule of this court, but only the statutory fee for drawing and engrossing the report.

**FEES of referees.** The referees in this case settled a special report under Rule 71 of this court, charging therefor a fee of three dollars per day for attendance and expenses of each referee, besides the usual fee for drawing and engrossing the report; and they declined delivering the report to the defendants' attorney, at whose instance it was made, until all these charges were paid.

A motion was made that the bill be taxed and the report delivered on such terms as the court should direct.

*By the Court, COWEN, J.* Let the *per diem* allowance be deducted, and the special report be delivered on paying the remainder.

Rule accordingly.

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*Ex parte PAINE.*

This court will not grant a mandamus to compel a county medical society to admit one as a member, where it clearly appears that if admitted he would be immediately liable to expulsion for gross ignorance or misconduct.

*Semble*, that even where an officer of a corporation has been irregularly removed, yet if there appear to have been good cause for removal, a mandamus will not lie to compel his restoration.

**MOTION** for mandamus against the Orange County Medical Society, commanding them to admit the relator as a member.

He being a resident of that county and having a diploma from the regents of the university as doctor of medicine, presented it to the society; but they refused to admit him

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Ex parte Paine.

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as a member on two grounds: 1. That he had offered by public advertisement to practice either on the "*Allopathic*" or "*Homœopathic*" system, as the patient should wish; and declared his intention to do so to a committee of examination appointed by the society; having, moreover, actually practised on the latter system. 2. That he had spoken disrespectfully of the society, and published a slanderous newspaper article concerning the members and a resolution passed by the society.

These grounds were shown by affidavits to be true. And it was further shown that the *Homœopathic* system of practice is contrary to the established system as followed by regular members of the medical profession.

Dr. Paine had, before the application and rejection in question, been some time in practice in the county of Orange, and notice had been served on him pursuant to 1 *R. S.* 448, 2d ed. § 1, 2, requiring him to apply for and receive a certificate of admission as a member of the society.

*By the Court*, COWEN, J. It is not denied that Dr. Paine held a proper licence to practice; and the question is, whether such a man, residing and practicing in a county of this state, is by law entitled to admission as a member of the county society, although they believe him to be a quack, and it is known that he is in an open quarrel with them, and has slandered them professionally.

The statute seems to impose a general obligation upon the society to receive every regularly licensed physician resident in the county, as a member; (*vid.* 1 *R. S.* 448, 2d ed. § 1, 2, 16, 24, 25;) and does not in terms allow the society to raise any objection; though it sanctions his expulsion for gross professional ignorance or misconduct, or when his conduct or habits are immoral. To effect his expulsion, specific charges must be preferred to and established before the judges of the county court. (1 *R. S.* 448, 9, 2d ed.) And on conviction he may be expelled and declared to be disqualified for ever after; or he may be suspended from practice.

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Ex parte Paine.

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It is sufficiently established in proof that the relator has wilfully departed in his practice from the approved and established rules of the medical profession; in short, that his practice is, in the opinion of the society, habitually empirical. This appears to be, in their opinion, the result either of gross ignorance in his profession, or it amounts to gross misconduct; and therefore they refuse to admit him. It is insisted by his counsel that he must be admitted at all events, and that if the society desire to prevent his practicing, they must prefer charges and proceed to a trial in the form prescribed by the statute. I incline to think they are not bound to do this, but may, prior to the admission of the candidate, in all cases, inquire and satisfy themselves whether any of the causes exist for which they might prefer charges against him; and on concluding in the affirmative may refuse to admit him as a member. To be sure, they ought to make a clear case on our being moved for a mandamus.

But if I am mistaken in supposing the society have a right to inquire, and refuse, I yet feel quite clear, that, under the circumstances of this case, we ought not to compel the admission of Dr. Paine into a society whose feelings he has outraged, and whose rules of practice he has openly set at defiance. We are enabled to see a moral certainty that, though the candidate should be received, he would either be expelled or suspended in the regular way, for the very cause of refusing to admit him. Seeing this, it would be indiscreet to interfere. On application for a writ of mandamus, we must sometimes exercise a discretion; and it has been said, that even where the officer of a corporation has been irregularly removed, yet if the court see good cause for removal, this prerogative writ shall not go to command a restoration. The reason given is, that by proceeding in a regular way, another motion would follow for the same cause. (*Rex v. The Mayor, &c. of Axbridge, Corp.* 523. And see per Ashhurst, J. in *Rex v. The Mayor, &c. of London*, 2 T. R. 181, 2.)

In the case before us, it is fully in proof by professional

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Anonymous.

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witnesses, men who understand the subject, that Dr. Paine is practically a quack in his profession. This implies gross ignorance, or gross misconduct, or both. We see that, if admitted, he should be expelled by the judges of the county court. And in the exercise of a proper discretion upon such proof, if on any other ground, we ought not to interfere.

Motion denied

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ANONYMOUS.

An affidavit to change venue on the ground of witnesses residing in another county need not show the nature of the action.

Nor need it state the county where the cause of action arose.

The doctrine of *Franklin v. Underhill*, (2 John. Rep. 374,) and *Tillinghast v. King*, (6 Cowen's Rep. 591,) declared inapplicable to cases of this kind since the revised statutes.

The affidavit need not be, in terms, that the party "has fully and fairly disclosed the facts he expects to prove," &c. ; but will be sufficient, in this respect, if it set forth simply that "he has stated the facts," &c.

Nor is it essential that, in respect to the value of the expected testimony, it should say, the witnesses are each, &c. material "to his defence:" other equivalent words may be substituted—as, that they are material, &c. "for the defendant," &c.

MOTION to change the venue. In this case, several objections were taken to the form of the affidavit on which the motion was founded.

It was said, that the affidavit did not state the nature of the action, so that the court might see whether it was local or transitory.

COWEN, J. That was held to be unnecessary, so long ago as 1804. (*Baker v. Sleight*, 2 Caines' Rep. 46.)

It was then said, the affidavit did not state that the cause of action arose in the county to which the venue was sought to be changed, according to what was required in *Franklin v. Underhill*, (2 John. R. 374,) and not elsewhere, as was required in *Tillinghast v. King*, (6 Cowen, 591.)

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Anonymous.

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COWEN, J. These cases have not been law since the 2 *R. S.* 330, 2d ed. § 2, sub. 3, in respect to applications for a change of venue in personal actions, with very few exceptions. We are there directed to retain or change the venue, according to the convenience of parties and their witnesses.<sup>(a)</sup> This alone is now the test, irrespective of where the cause of action arose. The subdivision cited extends to the great majority of actions brought in this court. The ground for granting or denying a change, generally lies entirely in the number and residence of witnesses, their value to be shown under the advice of counsel, according to the forms prescribed by our rules of practice. (*Vid. Anonymous*, 3 *Wend.* 425. *Constantine v. Dunham*, 9 *id.* 431. *Onondaga County Bank v. Shepherd*, 19 *id.* 10. *Vid. Grah. Pr.* 561, 2, 2d ed.)

An objection was also taken, that the affidavit did not accord with the form required in the case last cited, *Onondaga County Bank v. Shepherd*, (19 *Wend.* 10,) which is, "he has *fully and fairly* stated his case, &c. and disclosed the facts which he expects to prove," &c.; whereas here it is, "that he *has stated*, &c. the facts he expects," &c. without saying he has *fully and fairly disclosed the facts*, &c. either expressly or impliedly.

COWEN, J. This objection is not well taken. The words, *fully and fairly*, need not be applied to the disclosure of *facts* expected to be proved, but only to *the case* upon which advice is taken. The word, *stated*, is equivalent to *disclosed*.

Another objection was, that the affidavit should say that each and every witness named, "is a material witness to *his defence*," &c. as he is advised, &c.; whereas it was here "a material witness *for the defendant*."

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(a) See *Hull v. Hull*, *post*, p. 671.

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Wilson v. Darwin.

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COWEN, J. The form in this respect departs from what would seem to be a part of the form in 3 *Wend.* 425, to which, as was said in *Constantine v. Dunham*, (9 *Wend.* 431,) we ought to adhere. But we think the remark in the latter case was not meant of the words now in question. The words, *for the defendant*, as here used, are exactly equal to the words, *to his defence*; and are therefore sufficient.

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WILSON vs. DARWIN and another.

Though the action be *debt*, if it be brought on *an account*, and the defendant suffers interlocutory judgment by default, the plaintiff's damages must be assessed under a *writ of inquiry*.

In debt, on an account current, no plea having been put in, the plaintiff entered the defendant's default, and proceeded to final judgment and execution, without a writ of inquiry. The officer who taxed the costs had certified interest on the account after four months from the time when it was made, and allowed it as part of the costs, which were inserted in the judgment record.

A motion was made in behalf of the defendants to set aside the proceedings subsequent to the default, for irregularity.

*By the Court*, COWEN, J. We have held, that in *debt* on a *promissory note*, the damages must be assessed by the clerk. By parity, in *debt* on *account*, they must be assessed under a writ of inquiry.

Motion granted.

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Hull v. Hull.

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## HULL vs. HULL.

A motion to change venue was granted, for the convenience of witnesses, though it was shown in opposition that they would have to travel some few miles further, in case the venue was changed, than if it remained where the plaintiff had laid it. The residence of the witnesses, rather than the distance they will have to travel will generally control on questions of this sort.

*M. T. Reynolds*, for the defendant, moved to change the venue from *Allegany* to *Cattaraugus*, on an affidavit that the defendant had fifteen witnesses in the latter county.

*D. Burwell*, for the plaintiff, read an affidavit showing that the defendant's witnesses reside nearer the court-house in *Allegany*, where the venue was laid, than they do to the court-house in *Cattaraugus*, to which the defendant proposed to change the venue—the witnesses having only 25 miles to travel in the one case, and 27 in the other.

*By the Court*, BRONSON, J. On a question of venue, we look to the county in which the witnesses reside, rather than the distance they will have to travel ; and if under any circumstances the distance should be allowed to control, the difference in the amount of travel in this case is too inconsiderable to affect the question. As a general rule, the convenience of witnesses will be best consulted by having the trial in the county where they reside. That course will be less likely to disturb their social and business relations, than calling them into a foreign county.

Motion granted.



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Fisher v. Pond.

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## FISHER vs. POND, late sheriff, &amp;c.

Where a motion to strike out a plea as *false*, raises a question of *law* rather than of *fact*, it will be denied.

Accordingly, in *case* against a sheriff for neglect to return an execution, it appearing that the execution was returnable more than three years before suit commenced; *held*, that a plea of *not guilty within three years*, could not be struck out as false, on an affidavit proving the neglect to return it.

*Quere*, whether the statute of limitations commences running, in such case, immediately after the return day of the execution?

*Semble*, a plea of *not guilty within three years*, instead of *actio non accrevit*, &c., is bad

ACTION on the case against the defendant for not returning a *fi. fa.* delivered to him in favor of the plaintiffs, alleging that the defendant, before the return day, levied on sufficient goods to satisfy the execution, but that he had not paid the money or returned the writ. The defendant pleaded, 1st, not guilty, and 2d, that he was not guilty at any time within three years next before the commencement of the suit.

*H. A. Foster*, for the plaintiffs, on affidavits, stating that the execution was not returned, moved to strike out the second plea as *false*. It did not appear when the execution was returnable, though it was assumed by the counsel on both sides that it was more than three years before this suit was commenced.

*M. T. Reynolds*, for the defendant.

*By the Court*, BRONSON, J. Whether the plea is false or not, is more a question of law, than it is one of fact. It depends on the inquiry, whether the statute of limitations commenced running immediately after the return day of the execution; and that is not a matter to be settled in this way.

The plea may be bad because it says, *not guilty within three years*, instead of alleging that *the action did not ac-*

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Waring v. Acker.

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true within that time. (2 R. S. 296, § 22. *Dyster v. Battye*, 3 B. & Ald. 438.) But that question is not now before us, for this is neither a demurrer, nor a motion to strike out the plea as frivolous.

Motion denied.

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WARING vs. ACKER.

The statute allowing double or increased costs to officers, &c. (2 R. S. 512, 2d ed.) extends as well to *replevin* as to other actions.

The costs, however, of a *special motion* in the progress of the cause, are not within the provision.

DOUBLE costs. In an action of *replevin*, brought against the defendant for taking certain goods on execution as *sheriff* of the city and county of New-York, the costs of a special motion, made after verdict for the defendant, but pending a case, were ordered to be paid by the plaintiff. The taxing officer allowed the defendant the usual costs, *with one half in addition*. (2 R. S. 617, § 24.)

*N. F. Waring*, for the plaintiff, moved for a re-taxation, and insisted, *first*, that an officer was not entitled to double costs in the action of *replevin*; and *second*, that he was not entitled to such costs on a *special motion*. On the first point, he cited *Crummer v. Huff*, (1 Wend. 24.)

*A. L. Brown*, contra.

*By the Court*, BRONSON, J. The case cited was decided on the old statute which gave double costs to an officer in certain specified actions, among which *replevin* was not included; but the present statute gives increased costs to an officer without any reference to the form of the action. (2 R. S. 617, § 24.) Such costs may now be recovered in *replevin* as well as in other actions.

But the plaintiff must prevail on the other point. The

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The People v. Covert.

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statute only gives increased costs, in cases where judgment is rendered for the officer upon verdict, demurrer, nonsuit, nonpros, or discontinuance. It does not extend to costs upon special motions in the progress of the cause. (*Rider v. Hubbell*, 4 Wendell, 201.) From that case and others there cited, it will be seen, that double costs are only allowed in the cases particularly specified in the statute.

Motion granted.

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THE PEOPLE, *ex rel.* WOODWARD, *vs.* COVERT and others

A *certiorari* will not lie to remove the proceedings of persons acting as commissioners in the laying out of a highway, though it be shown that they omitted to take the oath of office within the time limited by law.

*Semble*, that a common law *certiorari* will not be granted where there is an adequate remedy by appeal; nor to review the proceedings of persons who are not officers in any sense, though they have assumed to act as such.

The question whether persons acting as commissioners of highways, are such, either *de facto* or *de jure*, cannot be reached by *certiorari*.

The acts of officers *de facto* are as valid, so far as the public is concerned, as though they were officers *de jure*.

THE defendants, as commissioners of highways of the town of Newtown, laid out a road over the relator's land, and

*M. T. Reynolds*, on his behalf, now moved for a *certiorari* to remove the proceedings into this court, on the ground that the defendants, although they had been duly elected commissioners, had not taken the oath of office within the time prescribed by law. They had taken the oath before proceeding to lay out the road, but, as was alleged, not until after the ten days allowed by law had expired. It was insisted that the defendants had forfeited their offices, and consequently that they had no jurisdiction to lay out the road.

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The People v. Covert.

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*By the Court, BRONSON, J.* It is impossible to grant this motion for several reasons. 1. If the defendants are commissioners, the remedy is by appeal to the county judges. 2. If they are not commissioners, nothing has been done. Their act in laying out the road is merely void. 3. A *certiorari* will not reach the question. It brings up nothing but the record, which states that the road was laid out by the defendants as commissioners. 4. The defendants are clearly commissioners *de facto*, and their acts are as valid, so far as the public is concerned, as though they were commissioners *de jure*.

Motion denied.



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### ABATEMENT.

1. When a declaration shows on its face that there is another person who, if living, ought to be joined as defendant, but does not allege expressly whether he is alive or not, the non-joinder cannot be taken advantage of by *demurrer*, but only by *plea in abatement*. *Burgess v. Abbott & Ely*, 476
2. Otherwise, if it be alleged in the declaration that the person is still living. *id*
3. The rule on this subject is the same, whether the action be founded in contract or on the judgment of a court of record. *id*
4. In pleading abateable matter, great fulness is required, and the pleader must leave nothing to intendment. *id*
5. *Semble*, if a declaration shows there are others who should be made *plaintiffs*, but is silent as to whether they are alive, the defendant may avail himself of the non-joinder by *demurrer*. *id*

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If a debtor, through a wilful misrepresentation or suppression of material facts in respect to the state of his affairs, induces his creditor to accept the note of a third person for part of the demand, in full payment and discharge of the whole, the accord and satisfaction are void; and even the creditor's release, obtained under such circumstances, may be set aside in equity. *Stafford v. Bacon*, 532

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1 A defendant in an action of slander, under the impression that he had no evidence to justify the words charged, pleaded the general issue; but afterwards discovering such evidence, he applied to the court and had leave to amend by adding a plea of justification. *Williams v. Cooper*, 637

2. Where, in slander, the words charged in the declaration imported that the

plaintiff was a thief, and had stolen the defendant's apples: HELD, that the plaintiff could not be allowed to amend by adding words accusing him of stealing boards, and which, though spoken before the suit was commenced, did not come to his knowledge till long afterwards; especially, as the right of action therefor had become barred by the statute of limitations. *id*

1 But, *semble*, the court will allow even a new cause of action to be added to the declaration by way of amendment, provided the suit was intended to embrace it, and it was omitted in declaring through a mistake of the pleader; and this, whether the statute of limitations has since closed upon it or not. *id*

2 Slanderous words charging the plaintiff with having stolen a particular thing, cannot be introduced into a declaration for words importing a charge of theft generally, under the notion of merely amending a variance; for they constitute distinct causes of action. *id*

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## ARBITRATION AND AWARD.

1. C. borrowed money of H., saying to him at the time, that if a contemplated contract for barrels between C. and H.'s firm was concluded, he would credit the firm with the money and

H. entered the money as a payment to C. on the firm books. The contract was concluded, and the barrels delivered under it to the firm; after which H., and R. his partner, entered into bonds with C., submitting to arbitrators *all and all manner of action, causes of action and demands*, pursuant to which an award was made; but on the hearing before the arbitrators, it was verbally agreed, that *the barrel contract, and any question arising out of it*, should be withdrawn from the arbitration; and accordingly that was not passed upon. C. subsequently sued H. & R. for the barrels delivered under the contract, and upon the trial, C. refused to allow the money got of H.; whereupon H. charged it back to himself on the firm books, and now brought his action to recover it. HELD, that the action could not be sustained. *Howard v. Cooper*, 44

2. If H. had originally the right to apply the money, when and as he pleased, then, under the circumstances, his only remedy was to have it used defensively, in the action of C. against the firm; and whether he had done so or not, and whether it had there been allowed or disallowed, it was barred by that suit. *id*

3. If the money in question passed as a naked loan, then, not being connected with the barrel contract, nor any question arising out of it, it was not one of the matters attempted to be withdrawn from the arbitrators, and so was barred by the award. *id*

4. And for the same reason, the award would be a bar, if C. had the option to apply the money or not on the barrel contract, and had made no election prior to the arbitration. *id*

5. Where a submission to arbitrators is under seal, a claim within it cannot be withdrawn, *by parol*, at the hearing, so as to prevent the award operating as a bar to a subsequent suit respecting such claim. *id*

6. A submission to arbitrators of the subject matter of a pending suit, and an award thereon, puts an end to the suit; and the plaintiff's remedy afterward is on the award. *West v. Stanley*, 69

7. A submission by D. and M. on one side, and W. and his partner on the other, will authorize an award in favor



- of the former, against *W. alone. Darter & M'Murray v. Wellington*, 319
8. In an action on an award, a court of law cannot enquire whether the arbitrators erred on the merits, or acted corruptly—but only whether the award is within the jurisdiction or power conferred by the submission. *id*
  9. That the arbitrators refused to swear the witnesses, but allowed them to be heard without oath, is at most mere error, and no defence to an action on the award. *id*
  10. On a motion to set aside an award, where provision is made for enforcing it by rule of court, other matters than those which are admissible as a defence to an action upon it, may be enquired into. *id*
  11. Where arbitration bonds required the award to be in writing, ready for delivery to the parties on or before a given day, and the arbitrators made an award, and delivered it to the prevailing party; *held*, that the other party, not having waived his right to a counterpart, and none having been prepared for him, the award was a nullity. *Buck v. Wadsworth*, 321
  12. In bonds of submission, where the concluding part of the condition is thus—"so as the said award, &c. be made in writing, &c. and ready to be delivered to the parties on or before," &c.—these words import a limitation upon the power conferred on the arbitrators, the observance of which is essential to their jurisdiction. *id*
  13. The only way in which an award under such bonds can be rendered binding, is by the arbitrators executing two parts, unless this is in some form expressly waived. *id*
  14. If one party tells the arbitrators they need make no counterpart, as he will not receive it, this will be deemed a waiver of his right. *id*
  15. An acceptance of a sworn copy of the award, in lieu of the original, is also a waiver. *id*
  16. A building contract provided, that in case of disagreement between the parties in respect to certain extra work, it should be appraised by two persons to be selected by the parties, and, in case of disagreement between the appraisers, then the appraisal to be made by an umpire: *Held*, that an award of the umpire pursuant to this arrangement was conclusive, and precluded a recovery for any thing beyond the amount fixed by it. *Butler v. The Mayor, &c. of New-York*, 489
  17. Due notice to the parties of the times and places appointed for the meeting of arbitrators, is to be presumed; and the party seeking to impeach the award for the want of such notice, must prove that it was not given. *id*
  18. Though one of the arbitrators appointed by the parties signed and sealed the award with the umpire; yet *held*, that it was to be regarded as the sole award of the latter, and the addition of the other signature might be treated as surplusage. *id*
  19. Arbitrators authorized to choose an umpire, are not bound to defer the choice until a disagreement between them; but may make it before proceeding to act upon the matters submitted. *id*
  20. The award in this case referring to the original contract; *held*, that both might be read as one paper, for the purpose of identifying the subject matter of the umpire's decision. *id*
  21. Where an award is ambiguous, the subject matter to which it relates may be identified by parol evidence. *id*
  22. Technical precision and certainty are never necessary in an award. If it be expressed so that plain men, acquainted with the subject, can understand it, that is sufficient, however short and elliptical the phraseology. *id*
  23. Where arbitrators were authorized to determine the increase or diminution in the cost of buildings by reason of extra work, which the contractor was bound to complete; *held*, that an award finding the contractor entitled to "receive \$2385.29 for the increased cost of said buildings, after he shall have filled up," &c. (specifying a part of the extra work not then completed,) was not rendered totally invalid by reason of the latter clause. *id*
  24. If, in respect to that clause, the umpire exceeded his jurisdiction, the party by whom the money was to be paid

had a right to insist that it should be regarded as mere surplusage, leaving the award to stand for the sum named as due immediately. *id*

25. *Semble*, that for the purpose of sustaining the award, the court would intend that the *filling up*, &c. was part of the extra work provided for by the contract; in which case, the finishing of it might properly be directed, or made a condition. *id*

26. An award importing on its face a regular adjudication pursuant to the submission, cannot be impeached, when used collaterally, by oral evidence that the arbitrator either exceeded his jurisdiction, or omitted to decide on all the matters submitted. *id*

27. *Semble*, that in a court of law, an award good by *intendment* is not open to collateral impeachment, on the ground that the arbitrators transcended or fell short of the limits of the submission; for the intendment being *presumptio juris et de jure*, can no more be contradicted than the legal effect of any other written instrument. *id*

28. Otherwise, since the case of *Elmendorf v. Harris*, (23 *Wend.* 628,) in respect to want of notice of hearing to the party. *id*

29. If an excess of jurisdiction appear on the face of an award, it is then void *pro tanto*, or *in toto*, according as the bad matter is, or is not separable from the good; and a separation should always be made, if possible. *id*

30. On a motion to set aside an award, it is examinable more freely than when used as the foundation of an action or defence. *id*

See COURT OF A JUSTICE OF THE PEACE, 7 to 9.  
PRACTICE, 17, 18, 19.

## ARREST.

See CONTEMPT.  
HABEAS CORPUS, 1 to 3.  
IMPRISONMENT.  
PLEADING, 8 to 12.  
PRACTICE, 8, 39, 40.  
WARRANT OF ARREST OR COMMITMENT.

## ARREST OF JUDGMENT.

See ATTORNEY AND COUNSEL, 4.  
JUDGMENTS AND EXECUTIONS, 9  
STATUTES, 2.

## ASSAULT.

See RAPE.

## ASSAULT AND BATTERY

See PLEADINGS, 8 to 12.

## ASSIGNEES OF INSOLVENT.

See DEED, 8.  
EJECTMENT, 4, 5.  
INSOLVENT.

## ASSIGNMENT

See ASSUMPSIT, 5, 6.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 49, 50.  
EVIDENCE, 42, 43.  
FRAUDULENT CONVEYANCES, 1, 2.  
INSOLVENT.  
INSURANCE, 7 to 12.  
JUDGMENTS AND EXECUTIONS, 1 to 3  
SET-OFF.  
SCIRE FACIAS.

## ASSIGNOR AND ASSIGNEE.

See EVIDENCE, 42, 43.  
SET-OFF.  
SCIRE FACIAS.

## ASSUMPSIT.

1. D., having contracted with the trustees of a religious society to do the carpenter's work of a church they were about erecting, and afterward becoming indebted to the plaintiff for doing part of it, gave him an order on the defendant, who was then treasurer of the corporation, and likewise one of the trustees and a member of the building committee; which order the defendant, on its presentation to him, promised should be paid in eight or ten days. There were

then funds enough in the defendant's hands as treasurer of the corporation, to meet the order, but *none specifically appropriated to D.*, the drawer; and the treasurer was not authorized to pay orders, unless countersigned by the building committee. Under these circumstances, *held*, that the defendant's promise was without consideration; but even were there a consideration, it was a promise to pay the debt of a third person, void for want of writing within the statute of frauds. *Quin v. Hanford*, 82

2. Regarding the order, moreover, as a bill of exchange, the acceptance was void, because not in writing. *id*

3. The case is not like those, where assumpsit has been held to lie against an executor, on his promise to pay the testator's debt or a legacy, and judgment was rendered *de bonis propriis*—for the assets in the hands of an executor are at his disposal exclusively; but in this case, the defendant held the funds of the society as bailee, subject to their control. *id*

4. *Semble*, even were the promise valid, the plaintiff could not recover under a count for money had and received. *id*

5. Had the defendant, instead of the society, been D.'s debtor, the order might have operated an assignment of the debt; in which case, on an express promise to pay, an action could, it seems, be maintained. And it would be sufficient, under such circumstances, to declare for money had and received. *id*

6. The principle is the same, where the person on whom the order is drawn has funds in his hands belonging to the drawer, and promises to pay. *id*

7. The defendant sold certain real estate to W., who gave back a bond and mortgage, which the defendant assigned to T.; afterward, W. re-conveyed the premises to the defendant, who then deceded them to B., covenanting for quiet enjoyment, and B. conveyed to the plaintiff; whereupon T. proceeded to foreclose the mortgage, and, on the sale under it, the plaintiff became the purchaser: *Held*, that assumpsit as for money paid, &c. would not lie by the plaintiff to recover against the defendant the purchase money paid on the mortgage sale, even though the defen-

dant had, on his selling to B., verbally promised him to pay off the mortgage; and consequently, evidence of the promise is, in such case, irrelevant and inadmissible. *Hunt v. Amidon*, 147

8. *Semble*, such promise could not have been available to B., had he retained the title, and become the purchaser under the mortgage; for if made prior to, or contemporaneous with the sale to him, it was merged in the deed; and if after, there having been no eviction, it was without consideration. *id*

9. A promise by the grantor to his grantee, to pay off an existing incumbrance, will not enure to one to whom the grantee subsequently conveys. *id*

10. T., the owner of a certificate of deposit in the bank of L., payable to order, caused it to be endorsed with directions that it should be paid to W. & Co., and then transmitted it to them by mail, though without their knowledge or request. It never reached W. & Co., but was stolen on its way, and their names forged upon it; after which, it came to the defendants' hands in the ordinary course of business, who collected the money upon it, supposing themselves to be the owners: *Held*, that T. had an election, either to sue the defendants in trover as for a conversion of the certificate, or to recover the amount in an action for money had and received. *Talbot v. Bank of Rochester*, 295

11. And though the bank of L. had been guilty of laches in apprising the defendants of the forgery after the payment of the certificate; *held*, that this constituted no defence against T.'s claim, however the matter might stand as between the defendants and the bank. *id*

12. Under such circumstances, a recovery and satisfaction in favor of T. against the defendants, would transfer the property in the certificate to the latter. *id*

13. The owner of a certificate of deposit who endorses it payable to another and sends it to him by mail, but without his knowledge, retains the property in it until the endorsee receives it. *id*

14. A mortgagor who has parted with the equity of redemption, but against whom there are judgments constituting liens

on the mortgaged premises, has still an interest that the property, when sold on the mortgage, shall bring enough to satisfy all the incumbrances; and hence, where he withdrew a bid made by him at the sale, and allowed the owner of the equity of redemption to purchase under the mortgage, the latter agreeing, in consideration thereof, to pay off the judgments: *Held*, a promise upon sufficient consideration, on which, after a failure to comply with it, the mortgagor might maintain an action. *Steele v. Babcock*, 527

15. An express promise to one having a personal interest in it, entitles him to sue in his own name for a breach, though the circumstances are such that its performance must have enured chiefly to the benefit of others. *id*

16. A plaintiff who seeks to recover upon a promise to pay the debt of a third person, must declare specially, and cannot avail himself of it under the common counts. *Beers v. Culver*, 589

**See: ARBITRATION AND AWARD**, 1 to 4, 16.  
**FRAUD.**  
**MONEY LENT.**  
**PLEADING**, 7, 17, 22, 23, 24.  
**PROMISE.**  
**TENANTS IN COMMON.**  
**TORT, WAIVER OF.**  
**SUNDAY**, 1.  
**VARIANCE.**

#### ATTACHMENT.

**See BAIL IN CIVIL CASES.**  
**CONTEMPT.**  
**DEBTORS, ABSCONDING, CONCEALED, &c.**  
**HABEAS CORPUS**, 1.  
**OFFICER**, 2 to 7.

#### ATTESTING WITNESS.

*See DEED*, 6, 7.

#### ATTORNEY, &c. AND CLIENT.

*See ATTORNEY AND COUNSEL*, 3 to 5.  
**EVIDENCE**, 4 to 13.  
**HABEAS CORPUS**, 1.

#### ATTORNEY AND COUNSEL.

Attorneys, &c. are, by legal fiction, deemed present in court during term

time; and *quere*, whether process is then necessary to warrant proceedings against them. *The People, ex rel. Johnson, v. Nevins*, 154

2. This court will take judicial notice that a person is one of its attorneys; and, *scilicet*, a supreme court commissioner, proceeding as such, should do the same. *id*

3. *It seems*, that it is not the absolute duty of counsel to raise objections which go merely to form, and are only calculated to produce delay, or turn the party round to another action. *Williams v. Eldridge and others*, 249

4. The authority of the defendant's attorney in virtue of his original retainer is deemed to continue until final judgment is *actually perfected*; and, therefore, prior to that being done, service on him of papers in the cause, though after the *entry of a rule* arresting judgment, is regular. *Lusk v. Hastings*, 656

5. The powers of an attorney for a party recovering damages or costs, whether plaintiff or defendant, continue, as to certain purposes, for a fixed period after final judgment. *id*

*See EVIDENCE*, 4 to 13, 24.  
**HABEAS CORPUS**, 1 to 3.  
**SUNDAY**, 1.

#### ATTORNEY GENERAL.

*See NOLLE PROSEQUI.*

#### AUDITING TOWN AND COUNTY CHARGES.

*See SUPERVISORS*, 8 to 15.

#### AUTHORITY.

*See ARBITRATION AND AWARD*, 5, 7 to 9, 11 to 30.  
**ATTORNEY AND COUNSEL**, 4, 5.  
**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 35, 43.  
**CANAL COMMISSIONERS**, 1 to 2.  
**CORPORATION**, 3.  
**CRIMES.**  
**DEPOSITION.**  
**JURISDICTION.**

**See** NOLE PROSEQUI.  
 OFFICER, 2 to 12, 17.  
 PARTNERSHIP, 3 to 9.  
 POWER.  
 PRINCIPAL AND AGENT.  
 SUPERVISORS.  
 SURROGATE.

### AVERMENT.

**See** ALLEGATION AND PROOF.

### AWARD.

**See** ARBITRATION AND AWARD.

## B

### BAIL IN CIVIL CASES.

1. *Held*, that a suit may be maintained by the sheriff upon a bail bond taken by him pursuant to the revised statutes, on an arrest, and nominal damages, at least, recovered, even though special bail in the original action was put in before the sheriff sued; the defendant being in default for not appearing according to the condition of the bond, and the sheriff having been subjected to the costs of an attachment for not bringing in the body; and this, without the sheriff having actually paid the costs, or put in bail in the original suit, or been subjected to any further liability. *Rosenstein and others v. Sammons, sheriff, &c.* 59
2. Where the surety in a bond to the sheriff for the appearance of S. on a *capias ad resp.*, pleaded *comperuit ad diem*: a replication that S. was an *infant*, and did not appear by *guardian*, was held bad. *Foster, assignee, &c. v. Rainsford, impleaded with Slingerland,* 323
3. Actions against special bail and upon bail bonds, should, in general, be brought in the court where the original suit was commenced; though when necessary they may be brought in other courts. *Otis and another v. Wakeman,* 604
4. When the action is unnecessarily brought in a court other than that in which the original suit was commen-

ced, the remedy of the party is by *motion*, and not by *plea*. *id*

5. Accordingly, in debt on a recognizance of bail taken in the supreme court of another state in a suit commenced there: *held*, not a good plea that the defendant, at and ever since the time of becoming bail, &c., was and still is a freeholder and resident of such state, subject to the jurisdiction thereof; these facts shewing nothing more than a case for equitable relief by *motion*. *id*
6. Such an action is in its nature transitory; and the fact that it arose in another state, or even in a foreign country, is not an objection to the jurisdiction of our courts respecting it. *id*

**See** PRACTICE, 8, 39, 40.  
 REPLEVIN, 2 to 4.

4

### BAIL IN CRIMINAL CASES.

**See** HABEAS CORPUS, 4 to 10.

### BAILMENT.

**See** ASSUMPSIT, 3.  
 LARCENY, 6, 7.

### BANKS.

1. Associations formed under the general banking law are *corporations*, and, as such, liable to taxation on their capital. *The People, ex rel. The Bank of Watertown, v. The Assessors of the Village of Watertown,* 616
2. The case of *Warner v. Beers*, (23 *Wendell*, 103,) explained; and additional reasons advanced in support of the decision in *Thomas v. Dakin*, (22 *Wend.* 9,) *id*

**See** BILLS OF EXCHANGE AND PROMISSORY NOTES, 2 to 5, 19, 20, 33, 44 to 46.

EVIDENCE, 2.  
 PARTNERSHIP, 7, 8.  
 WITNESS, 10, 11.

### BAR BY FORMER SUIT OR AWARD.

**See** ARBITRATION AND AWARD, 1 to 6, 8 to 30.

**See DEBTORS, ABSCONDIING, CONCEALED,  
&c. 3, 4.  
EVIDENCE, 44.  
JUDGMENTS AND EXECUTIONS, 9.**

**BARRATRY.**

**See INSURANCE, 1.**

**BASTARDY.**

**See BOND, 4 to 7.  
MARRIAGE.  
WITNESSES, 4.**

**BEQUEST.**

**See WILL, 6, 7.**

**BILL OF EXCEPTIONS.**

1. Where the judge at the trial submitted a question to the jury which had not been made by the evidence, and the party prejudiced by it, instead of excepting specifically on that ground, asked instructions on another matter, which were not given, the judge instructing the jury differently, whereupon the party excepted, in general terms, "*to the judge's charge*:" HELD, that the exception could not be construed as reaching beyond the matter which immediately preceded it, and therefore the party was remediless, on error, as to the other point. *Labron & Ives v. Woram*, 91
2. His remedy was either by a more specific exception, or a motion in the court below for a new trial. *id*
3. An exception for the admission of evidence, not sufficient, *per se*, to make out a defence, but constituting part of a chain of proofs tending to that end, cannot be sustained. *id*
4. Where the defendant insists at the circuit, that the facts proved by him, constitute an entire bar to the action, and, being overruled by the judge, excepts; he cannot, under such an exception, raise the question at bar, whether the facts ought not to have gone in mitigation of damages. *Payne v. Ladue*, 116

**See DEMURRER TO EVIDENCE, 8.  
INQUEST.  
NEW TRIAL.**

**BILL OF PARTICULARS.**

**See PRACTICE, 20 to 23, 31.**

**BILL OF SALE.**

**See FRAUD, 23, 26, 27.**

**BILLS OF EXCHANGE AND  
PROMISSORY NOTES.**

1. Where a notary at New-York, ignorant of the residence of an endorser, sent a notice of protest for him, to K. & D. at Albany, by whom it was received in due course of mail, and then deposited in the post office, directed to the endorser at his place of residence; *held*, sufficient to charge the endorser, there being no pretence that it was too late. *Safford v. Wyckoff, president, &c.* 11
2. A bill of exchange commencing, "*Farmer's Bank of Seneca County*," directing the drawee, after payment, to "*charge this institution*," and signed "*J. J. F. Cash'r*," is to be deemed the act of the bank. *id*
3. Associations under the general banking law have no authority to make bills of exchange, or to issue any negotiable paper save under the sanction of the comptroller, and in the form prescribed by statute. *id*
4. No action can be maintained against the bank or others upon paper so illegally issued, this appearing on its face. *id*
5. *Quere*, whether the endorsee of such paper can recover against his immediate endorser, in an action for the consideration. *id*
6. A person endorsing a paid bill of exchange, or one otherwise inoperative against others, may be subjected to liability upon it, unless some statute or principle of public policy intervenes to prevent it. *id*
7. Where a note was given for a fanning mill, conditioned, that if the maker was not suited with it, he should re

- turn the same in a given time to the payees, they, in that event, to furnish him with a new mill: *held*, that the maker having returned the mill within the time, and refused to accept a new one, though offered him by the payees, he was entitled to no abatement from the amount of the note by reason of latent defects in the mill. *Pinney & Price v. Hall*, 89
8. Where the plaintiffs endorsed a note payable to the order of the defendant, which, as they knew, was created and intended to secure the latter for a loan to be made by him to the maker; and the defendant, after making the loan, negotiated the note, putting his own name on the back: *held*, that though the plaintiffs had paid it, they could not subject the defendant as first endorser. *Labron & Ives v. Woram*, 91
9. Had the note not been negotiated, the defendant might have written a guaranty over the plaintiffs' names, and, in that form, recovered from them the amount of the note. *id*
10. If the plaintiffs had put their names on the note as ordinary endorsers merely, without knowledge of the negotiation between the maker and the defendant, they would have been entitled, *it seems*, as against the defendant, to all the rights of second endorsers. *id*
11. Upon the settlement of a slander suit brought by L. against P., the latter gave up certain notes against the former, discontinued certain suits, and agreed to sign a retraction of the slander; and L., in consideration thereof, executed to P. a note, which he delivered to P. on condition that it was to be returned if the retraction was not signed, and to have no validity till then: *Held*, that though P. failed to sign the retraction, the note was not void, and he might maintain an action upon it. *Payne v. Ladue*, 116
12. *Seem*, that had the settlement of the slander suit constituted the sole consideration for L.'s note, P.'s failure to sign might have operated as a defence, on the principle of showing want or failure of consideration. *id*
13. But where, as in this case, the consideration is composed of several things, and the defendant has received a part of it, the only way in which complete justice can be done, is by leaving each party to his action. *id*
14. Whether the failure of P. to sign, could come in to affect the amount of damages, *quere*. *id*
15. One who guarantees the payment of a negotiable note, absolutely, by an endorsement on it to that effect, made at or prior to its delivery to the payee, becomes, in legal effect, a joint and several maker, and may be sued as such by any subsequent holder. *Lequeer and others v. Prosser*, 256
16. The guarantor's liability, in such case, is the same as if he had signed his name directly to a joint and several note, as surety for the maker. *id*
17. A common *due bill* is a promissory note, within the statute. *id*
18. So, *seem*, of any simple contract in writing, importing an absolute engagement that money shall be paid; e. g. "I promise that J. S. shall receive £100"—or "I will see that £100 is paid by J. S." &c. *id*
19. Where H. an endorsee of a bill of exchange, endorsed it to a bank for the mere purpose of collection, and the notary employed by the bank transmitted notice of protest by mail to H. on the next business day after presentment, &c. who, on the next day after receiving it, mailed notice to his endorser: *Held*, sufficient to fix the liability of the latter, though, had the notice been sent directly to him, he would have received it sooner; and this, *seem*, whether the notary be regarded as H.'s agent, or that of the bank. *Howard, president, &c. v. Ives*. 267
20. A bank, however, receiving a bill of exchange in this way, is a principal for the purpose of transmitting notice of protest, and consequently a notary entrusted by it for that purpose is its agent. *id*
21. The *next day*, in the sense of the rule as to reasonable notice of protest through the post, is the next *business day*; and therefore, where protest takes place on *Saturday*, a notice mailed on the following *Monday* is in time. *id*
22. If two mails leave on the day for sending notice, and one closes before



- the usual business hours, a notice is regular if transmitted by the other. *id*
23. Whether, if there are several mails leaving on the same day at different hours, the party may in all cases elect by which he will send, *quere.* *id*
24. In charging consecutive endorsers by notices from one to the other, the party receiving notice is never bound to forward it to his immediate endorser on the *same day* it reaches him, but may wait till the *next.* *id*
25. The defendants, endorsees of a draft payable to B.'s order, received the same through several successive endorsements, B.'s name appearing as the first, and, as agents of their immediate endorser, but without disclosing their agency, presented it to the plaintiffs, by whom it was paid. The latter subsequently ascertained that the name of B. was a forgery; and having notified the defendants of this fact, sued to recover back their payment. *Held*, that though the defendants were innocent of any intended wrong, they had obtained money of the plaintiffs on an instrument to which they had no title, and were therefore bound to refund; and this, though notice of the forgery was not given till more than two months after they had received the money, and transmitted it to their principal. *Canal Bank v. Bank of Albany,* 287
26. *Held* also, that the payee was not disqualified by interest from being a witness for the plaintiffs. *id*
27. None but the payee can assert any title to a bill or note payable to order, without his endorsement. *id*
28. *Semble*, that if one accept a draft in the hands of a *bona fide* holder, he will not be allowed afterward to dispute the genuineness of the *drawer's* signature, though he may that of the *endorsers*; and *payment* operates, in this respect, the same as an *acceptance.* *id*
29. Money paid by one party to another through a mutual mistake of facts, in respect to which both were equally bound to enquire, may be recovered back. *id*
30. *Semble*, where a drawee of a draft has paid it to an innocent holder on the faith of a forged endorsement, mere lapse of time in the abstract, however long, between the payment and notice of the forgery, will not deprive him of his remedy over; provided he has incurred no unreasonable delay *after discovery of the forgery.* *id*
31. Cases relating to the effect of delay in giving notice under these and similar circumstances, commented on, and some of them disapproved; especially *Cocks v. Mastermun*, (9 Barn. & Cress. 902,) *id*
32. Where several successive endorsees have advanced money on a draft payable to order, and it turns out that neither had title, by reason of the first endorsement being a forgery, each may recover from his immediate endorser. *id*
33. A bank to which a draft is endorsed and sent for the purpose of collecting it as agent of the endorser, and which transacts the business without disclosing its agency, may be regarded and charged as principal by those with whom it thus deals. And it will be no answer, that it is the uniform custom of banks to transact such business without disclosing their agency. *id*
34. In an action against makers and endorsers of a note under the *act of April 25th, 1832*, (*Sess. L. 1832, p. 489.*) the plaintiff cannot resort to the original consideration as independent ground of recovery. *National Bank v. Norton, impleaded, &c.* 572
35. Where H. testified that he was the general agent of a firm entrusted with the sole charge of their business, and that as such he had been in the habit of drawing drafts and making notes and endorsements for them; *held*, sufficient to go to the jury as a ground for inferring that he had authority to bind his principals by an *accommodation acceptance*, though the power conferred on him by the articles of copartnership did not extend so far, and he had never before attempted to bind the firm in that way. *Commercial Bank of Lake Erie v. Norton & Fox, impleaded, &c.* 501
36. In general, the acceptor of an accommodation bill of exchange, must, in respect to the holder, be regarded as principal, and cannot defend on the ground of want of consideration between him and the drawer; and this, though the holder took the bill from the



- person to whom it was lent, with full knowledge of its character. *id*
37. Otherwise, if it be shown that the plaintiff is not a *bona fide* holder; as, that he took the bill with knowledge of its having been accepted for some purpose different from that to which it was applied. *id*
38. Where plaintiffs have taken and discounted a bill before acceptance; *semble*, that the acceptors are not estopped from disputing their liability on the ground of want of consideration. *id*
39. But a consideration of some kind, (e. g. forbearance toward the drawer, &c.) will be presumed till the contrary be shown; and the acceptor must negative every possible intendment. *id*
40. A naked precedent debt of another, is not *per se* a sufficient consideration to sustain a promise or acceptance. *id*
41. The legal effect of a note can no more be contradicted than its direct expressions. *id*
42. *Semble*, that the words, "value received," in a special guaranty of the debt of a third person, or in a note made and delivered for the like purpose, are not open to contradiction by oral evidence. *id*
43. Where one borrows money and draws on another who afterwards accepts, it should be intended that the latter had originally authorized the drawer to borrow on these terms; and then the transaction will be equivalent to a loan made on the request of the acceptor. *Semble*. *id*
44. A note drawn payable at the bank of A., was endorsed by C. and L. for the accommodation of the maker, to enable him, as he told the endorsers at the time, to raise money at the bank for purchasing barley; instead of which, the maker caused the note to be applied in payment of a debt which he and V. owed at another bank: *Held*, not such a diversion of the note from its alleged object as to discharge the endorsers, it not appearing that, at the time of endorsing, the use to which it might be applied was at all important to them. *Mohawk Bank v. Corey & Livermore, impleaded, &c.* 513
45. Otherwise, *semble*, had the note been made for the purpose of taking up another note in the bank of A. to which the endorsers were parties. *id*
46. Where a bank received B.'s note, endorsed by C., L. and V., before it became due, in payment of other notes of B. endorsed by V. alone, thereupon delivering up the latter and discontinuing a suit commenced thereon; *held*, a sufficient *parting with value* to entitle the bank to the rights of a *bona fide* holder. *id*
47. E. and C., being in partnership, gave their note for a precedent debt of the firm, under an agreement that it should be received in full satisfaction and discharge. Afterward they dissolved, E. agreeing, for a consideration received from C., to assume and pay the debt for which the note was given; in pursuance of which arrangement, C. took up the note, and gave his own in lieu thereof. *Held*, no bar to a recovery upon the original consideration. *Cole v. C. Sackett and E. Sackett*, 516
48. An order not payable on its face in money, and drawn on a particular fund, is not a bill of exchange within 1 R. S. 757, § 6, 2d ed. requiring a written acceptance. So *held*, in respect to an order by a landlord on his tenant to pay the rents accruing during a specified period; and this, though it appeared on inquiry *aliunde* that the rents were payable in money. *Morton v. Naylor*, 583
49. Where a landlord, for value received, gave an order on his tenant to pay W. the rents accruing during a certain time, which the tenant, on the order being presented, said he would do; and the landlord subsequently notified the tenant not to pay, but the latter disregarded the notice and paid the order: *Held*, that the tenant did right, and that the landlord's claim for the rent was extinguished. *id*
50. An order of this nature operates an equitable assignment of the fund on which it is drawn, and the drawee being notified of the assignment, must pay accordingly, though there be no formal acceptance, either written or verbal. *id*
51. Where A. made and lent to B. a note, expressly to enable the latter to borrow money from a particular person, and, instead of using it for that purpose, B. delivered it to C. as collateral security for a previous debt, C. taking it with

knowledge of the circumstances under which it was made; *held*, that the note was not an available security in C.'s hands. *Beers v. Culver*, 589

52. And C. having transferred the note to D., (who also knew the circumstances under which it was given,) upon a promise by the latter to pay the debt of C. against B.; *held*, that the promise was without consideration, and therefore void. *id*

See ASSUMPSIT, 1 to 6.  
EVIDENCE, 42, 43, 50, 51.  
JUDGMENTS AND EXECUTIONS, 7, 8.  
PARTNERSHIP, 3 to 5.  
PAYMENT.  
PLEADING, 24.  
PRACTICE, 20 to 23, 31, 36 to 38.  
PRINCIPAL AND AGENT, 1 to 3  
PRINCIPAL AND SURETY, 1, 4, 5.  
USURY.  
VARIANCE, 2.

## BOND.

1. A bond given to the sheriff by a deputy and his surety, on the appointment of the deputy to office, conditioned, among other things, for saving the sheriff harmless from liability on account of the deputy's conduct, and for paying over to the sheriff one half the sheriff's fees arising from business done by the deputy, is not within the statute against the taking of bonds by sheriffs, &c. *colore officii*, or the statute against selling offices. *Mott v. Robbins*, 21
2. Where the principal, on appointing a deputy, takes an agreement from him for the payment of a gross sum, which is not to come out of the profits of the office, the contract is void. *id*
3. Otherwise, where the principal merely reserves a part of the fees of his office, or a sum certain, which is to come out of the profits. *id*
4. A bond taken by a justice of the peace, in a prosecution for bastardy, containing, in addition to the provisions required by law, others, imposing further obligations on the obligor is void. *The People v. Meighan and others*, 298
5. Accordingly, where M., being arrested on a charge of bastardy in a county other than the one where the warrant

issued, entered into bond, conditioned to "indemnify any town," &c. (as provided by 1 R. S. 650, § 8, 2d ed.) and also, to "pay the sums for the support of the bastard and the sustenance of its mother, as the same is ordered by J. I. B. (the justice who issued the warrant.) and such other justice as shall associate with him, or as shall be ordered by the court of general sessions," &c.: *HELD*, an unauthorized bond, taken *colore officii*, and therefore void in toto. *id*

6. *Quere*, whether, independent of the statute against unauthorized bonds, &c. taken *colore officii*, the bond in this case might not have been upheld. *id*
7. Nothing contained in a bond by way of recital will estop a party to it from showing it to be void, as having been taken by an officer *colore officii* and without authority of law. *Germond and another v. The People, ex rel. &c.* 343

See ARBITRATION AND AWARD, 1, 5, 11 to 15.

RAIL, 1 to 6.  
COURT OF SPECIAL SESSIONS.  
DEBTORS, ABSCONDING, CONCEALED &c. 1.  
PLEADING, 13 to 15.  
PRACTICE, 15.  
PRINCIPAL AND SURETY, 1 to 6.  
REPLEVIN, 2 to 4.  
SURROGATE, 1.

## BRIDGES.

See SUPERVISORS, 1 to 7.

## BROOKLYN, CITY OF.

See STREETS, 9 to 11.

## BUILDING ON ANOTHER'S LAND.

See FIXTURES.

## BURGLARY.

See OFFICER, 9, 10.

## BUSHEL.

See WEIGHTS AND MEASURES, 1, 2.

## C

## CANAL COMMISSIONERS.

1. The canal commissioners, under the act for the construction of the Crooked Lake Canal, caused surveys, &c. to be made and then adopted a plan, as required by the act, preliminary to commencing the work; but the plan had no reference to the defendants' dam, then standing at the outlet of the lake. Afterward, however, the commissioners, by way of substitute for a portion of the machinery contemplated by the plan, permitted the defendants to increase the height of their dam; which being done, caused an injury to the plaintiff's lands lying above, greater than would have resulted had the plan been pursued: *Held*, that the alleged authority from the commissioners constituted no protection to the defendants, against the plaintiff's claim for damages. *Jermaine v. Waggener and another*, 279
2. The powers conferred on the commissioners, in respect to the adoption of the plan mentioned, were *quasi* judicial; and having once passed upon the question, and determined what the plan should be, their jurisdiction in that particular was at an end. *id*
3. *Seem*, had the act stopped with a general authority to the commissioners to construct and complete the canal, their power to authorize the raising of the dam in question at any stage of the work, might have been implied; and they having adjudged it necessary that the power should be exercised, and given the defendants authority to execute it, the latter would have been protected. *id*
4. But the commissioners' power being restricted to the adoption of a plan before commencing the work, and having been exercised accordingly, any departure from the plan fixed upon, injuriously affecting a third person, forms a ground for the recovery of damages. *id*
5. The rule, protecting one for acts done by him under the direction of a judicial body, *prima facie* authorized to give the direction, does not apply, where the jurisdiction of those giving the direction is limited to a *single act*, and has become *functus officio* by its performance. *id*
6. It is different in respect to magistrates or commissioners, having power to act on certain questions of property as they accidentally arise, in the form of litigation, assessment, &c.; for their agency is general. *id*
7. *Seem*, that a mere volunteer in the execution of an order or process, not legally *compellable* to perform that duty under any circumstances, is responsible even for latent jurisdictional defects. *id*
8. *Held*, that the raising of the dam in question could not be defended on the presumption that it was done pursuant to 1 R. S. 206, §§ 17 and 18, 2d ed. relating to *extraordinary repairs*; as an application for that purpose, and an adjudication thereon by the canal board, did not appear to have been made, and are not to be presumed. *id*
9. Nor was it defensible as a necessary act of *ordinary repair*, within 1 R. S. 208, § 32, *subd. 2*. *id*

## CAPIAS AD RESPONDENDUM

See PRACTICE, 8.

## CAPIAS AD SATISFACIENDUM

See IMPRISONMENT.

## CASE.

See NEW TRIAL, 2, 2  
PRACTICE, 1, 2.

## CASES OVERRULED, DOUBTED OR EXPLAINED.

Arnold v. Camp, (12 John. R. 409.) considered and disapproved. *Cole v. C. Sackett & E. Sackett*, 516

Bowman v. Ely, (2 Wend. 250.) reviewed and explained. *The People v. Webb*, 179

Brant v. Fowler, (7 Cowen's Rep. 562.) partially overruled. *Wilson v. Abrahams*, 297

Bunting v. Brown, (13 John. R. 425.) rule of, changed by the revised statutes *Bronley v. Town*, 373

- Cocks v. Masterman**, (9 B. & C. 902,) disapproved. *Canal Bank v. Bank of Albany*, 287
- Commissioners, &c. v. The Judges, &c.**, (9 Wend. 434,) overruled. *The People, ex rel. Onderdonk, v. Supervisors of Queens County*, 195
- Crogate's case**, (8 Co. Rep. 132,) overruled in part. *Stickle v. Richmond*, 77, 79
- Denning v. Corwin**, (11 Wend. 647,) overruled in part. *Bloom and others v. Burdick*, 130
- Douglass v. Clark**, (14 John. Rep. 177,) overruled. *Thomas v. Allen*, 145
- Forgey v. Sutliff**, (7 Cowen's Rep. 713,) virtually overruled by *Priest v. Cummins*, (20 Wend. 338.) *Butler & Barker v. Van Wyck*, 461, 463
- Franklin v. Underhill**, (2 John. Rep. 374,) and *Tillinghast v. King*, (6 Cowen's Rep. 591,) limited and explained. *Anonymous*, 668
- Green ads Willis**, (1 Wend. 78,) overruled. *Kerker & Willetts v. Carter*, 101
- Haswell v. Goodchild**, (12 Wend. 373,) commented on and explained. *Rudd and another v. Davis*, 277
- Hewson v. Dygert**, (8 John. Rep. 333,) overruled. *Davis v. Tiffany*, 642
- Hoyt v. Gelston**, (13 John. Rep. 139,) reviewed and some of its dicta disapproved. *Burt v. Mapes*, 649
- Jackson, ex dem Colden, v. Brownell**, (1 John. Rep. 267,) considered and questioned. *Putnam and others v. Wise*, 234
- Jackson, ex dem. Martin, v. Van Antwerp**, (1 Wend. 295,) overruled. *Semble, Ryers v. Hedges*, 646, 647. *Livingston v. Clements*, 548
- Jackson, ex dem. M'Fail and others v. Crawfords**, (12 Wen. 533,) commented on and explained. *Bloom and others v. Burdick*, 130
- Kent v. Walton**, (7 Wend. 256,) *Whitaker v. Brown*, (8 id. 490,) doubted, but confirmed on the principle of *stare decisis*. *Beach v. Wise*, 612
- Livingston v. The Peru Iron Company**, (9 Wend. 511,) so far as it stands on the reasons assigned for the judgment, was disregarded in *Humbert v. Trinity Church*, (24 Wend. 587.) *Butler & Barker v. Van Wyck*, 461, 463
- Lovett v. Pell**, (22 Wend. 369,) doubted. *Whitney v. Crim*, 61
- Messenger v. Holmes**, (12 Wend. 103,) reviewed and explained. *The People v. Webb*, 179
- Mowrey v. Walsh**, (8 Cowen's Rep. 238,) doubted. *Ash & Anners v. Putnam*, 302
- Murray v. Riggs**, (15 John. Rep. 571,) said to have been very much shaken, if not completely overturned by *Mackio v. Cairns*, (5 Cowen's Rep. 547.) *Butler & Barker v. Van Wyck*, 463
- People v. Works**, (7 Wend. 486,) overruled. *The People, ex rel. Onderdonk, v. Supervisors of Queens County*, 195
- People v. McGaren**, (17 Wend. 460,) explained. *The People v. Cogdell*, 94, 96
- People, ex rel. Lovett, v. Rogers**, (2 Paige, 103,) commented on and explained. *The People, ex rel. Johnson, v. Nevins*, 154, 169
- Root v. Stuyvesant**, (18 Wend. 257,) said to have been virtually overruled since. *Butler & Barker v. Van Wyck*, 461, 463
- Selby v. Bardonis**, (3 Barn. & Adol. 2,) overruled. *Stickle v. Richmond*, 77, 79
- Smith v. Mercer**, (6 Taunt. 76,) disapproved. *Canal Bank v. Bank of Albany*, 287, 292
- Smith & Hoe v. Acker**, (23 Wend. 653,) explained and doubted. *Butler & Barker v. Van Wyck*, 438. *Prentiss v. Slack and another*, 467. *Fuller v. Acker*, 473
- State v. J. N. B.** (1 Tyler's Vt. Rep. 36,) overruled. *Ratcliff v. Wales*, 63, 65
- Stewart v. Doughty**, (9 Johns. Rep. 108,) considered and questioned. *Putnam and others v. Wise*, 234
- Taylor v. Betsford**, (13 Johns. Rep. 487,) explained. *Whitney v. Crim*, 61
- Tillinghast v. King**, (6 Cowen's Rep. 591,) limited and explained. *Anonymous*, 668
- Welch v. Hall**, (Bull. N. P. 85, Lond. ed. 1788,) overruled. *Putnam and others v. Wise*, 234

**CERTIFICATE OF ACKNOWLEDGMENT OR PROBATE**

See DEED, 6, 7.  
EVIDENCE, 38 to 40.

**CERTIFICATE OF DEPOSIT.**

See ASSUMPT, 10 to 13.

**CERTIFICATE OF JUSTICES.**

See COURT OF SPECIAL SESSIONS.

**CERTIFICATE OF TOWN AUDITORS.**

See SUPERVISORS, 8 to 12.

**CERTIORARI.**

1. On motion for a common law *certiorari*, opposing affidavits may be read, notwithstanding the case of the *Commissioners, &c. v. The Judges, &c.* (9 Wend. 434,) apparently *contra*. *The People, ex rel. Onderdonk, v. The Supervisors of Queens County*, 195
2. Until the proceedings of an inferior tribunal are removed into this court, no order to quash them can be made, however irregular they may be. *id*
3. It is seldom proper to award a common law *certiorari*, where the party has an adequate remedy, against the proceeding complained of, by action. *id*
4. A *certiorari* will not lie to a ministerial officer (e. g. a collector of taxes,) for the purpose of examining his right to proceed upon process under which he is acting. *id*
- 5 Nor will it lie to any inferior tribunal except to remove proceedings which still remain before it. *Semble. id*
6. A *certiorari* will not lie to remove and correct the proceedings of a board of supervisors in assessing town and county taxes. *id*
7. A *certiorari* will not lie to remove the proceedings of persons acting as commissioners in the laying out of a high-

way, though it be shown that they omitted to take the oath of office within the time limited by law. *The People, ex rel. Woodward, v. Covert and others*, 674

8. *Semble*, that a common law *certiorari* will not be granted where there is an adequate remedy by appeal; nor to review the proceedings of persons who are not officers in any sense, though they have assumed to act as such. *id*

9. The question whether persons acting as commissioners of highways are such, either *de facto* or *de jure*, cannot be reached by *certiorari*. *id*

See COURT OF A JUSTICE OF THE PEACE JURISDICTION, 7.

**CHALLENGE.**

See JURY, 5, 6.

**CHANCERY.**

See ACCORD AND SATISFACTION.  
EVIDENCE, 48, 49.  
FRAUD, 24.  
JUDGMENTS AND EXECUTIONS, 2,  
PRACTICE, 51 to 53.

**CIRCUIT ROLL.**

See PRACTICE, 28 to 30.  
PRINCIPAL AND SURETY, 1, 2

**CO-CONTRACTORS.**

See RELEASE.  
WITNESS, 7 to 9

**CODICIL.**

See WILL.

**COHABITATION.**

See MARRIAGE, 1, 3, 4, 5.

**COLLECTOR OF TAXES.**

See CERTIORARI, 4.  
MANDAMUS, 2.

*See* OFFICER, 15.  
POWER, 3.  
PRACTICE, 7.

# COLOUR IN PLEADING.

*See* PLEADING, 18 to 21.

# COMMISSION TO TAKE TESTIMONY.

*See* DEPOSITION.  
PRACTICE, 49, 50.

# COMMITMENT.

*See* CONTEMPT.  
HABEAS CORPUS.  
WARRANT OF ARREST, OR COMMITMENT.

# COMMITTEE OF LUNATIC.

*See* IDIOTS, LUNATICS, &c.

# COMMON CARRIERS.

*See* RELEASE.  
WITNESS, 7 to 9.

# COMMON LAW.

Great and sudden changes in the common law ought not to be made by judicial decision, but left to the action of the legislature. *Bronson, J. in Butler & Barker v. Van Wyck*, 459, 460

# COMPERUIT AD DIEM.

*See* BAIL IN CIVIL CASES, 1, 2.

# COMPETENCY.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 26.  
WITNESS.

# COMPLAINANT.

*See* COURT OF SPECIAL SESSIONS.

# CONDITION.

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 11 to 14.  
EVIDENCE, 14.  
TURNPIKE LAW.

# CONFIDENTIAL COMMUNICATIONS.

*See* EVIDENCE, 4 to 13.

# CONSIDERATION.

*See* ACCORD AND SATISFACTION.  
ASSUMPSIT, 1, 3, 5, 6, 14  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 3 to 5, 7, 11 to 14, 32, 34, 36 to 43, 51, 52.  
BONDS, 1 to 3.  
EVIDENCE, 46, 47.  
FRAUD, 28 to 32.  
FRAUDULENT CONVEYANCES.  
POWER, 1, 2.  
PROMISE.  
STREETS, 10, 11.  
SUNDAY.  
TURNPIKE LAW, 1.  
USURY.

# CONSTABLE.

*See* MONEY LENT.  
OFFICER, 1 to 7.

# CONSTITUTION.

1. The constitution of this state, (*Art. 7th*, § 2,) relating to the right of trial by jury, &c. has no reference to proceedings intended merely to prevent the commission of offences. *Duffy v. The People*, 355
2. A statute authorizing a magistrate, summarily and without jury, to convict one who has abandoned his family, of being a disorderly person, and to require from him sureties for good behaviour, is not unconstitutional. *id*
3. The act of April 15th, 1839, (*Sess.* 1839, p. 147, § 1,) regulating the speed of steamboats while passing, coming to, or going from the wharves of the city of Albany, is not repugnant to the constitution, or any law which congress has passed under its power "to regu

late commerce," &c. *The People v. Jenkins*, 469

See REDEMPTION  
STATUTES.

### CONSTRUCTION OF WRITTEN INSTRUMENTS.

See ARBITRATION AND AWARDS, 11, 12.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 9, 10, 15 to 18, 48.  
COVENANT.  
DEED, 1.  
INSURANCE, 1, 2, 5, 10, 11.  
PLEADING, 1 to 3, 13 to 15.  
STREETS, 1 to 3, 5 to 7.  
SURROGATE, 6.  
TENANTS IN COMMON, 1 to 4, 9 to 11.  
VARIANCE, 3 to 6.  
WEIGHTS AND MEASURES.  
WILLS.

### CONTEMPT.

- 1 The sum for the non-payment of which a commitment is ordered, need not be named in the order, but may be ascertained through a reference thereby directed to the proper officer; and the officer's report, when perfected, though made after the order, is to be regarded as a part of it. *The People, ex rel. Johnson v. Nevins*, 154
2. The jurisdiction of *courts of record* as to the *person*, in cases of commitment for contempt, is to be intended. *id*
3. A rule of a *court of record* that a defendant be committed for contempt, need not recite the prior proceedings; if it is such a rule as the court might legally make under any supposable state of circumstances, all jurisdictional steps and matters of regularity are to be presumed. *id*
4. For defects in respect to matters of *regularity*, the only remedy is by motion. *id*
- 5 Jurisdiction of the person once acquired, by arrest under an attachment for contempt, continues while the case is under examination, whether the defendant remain in *actual custody*, or not. *id*
6. Under a non-bailable attachment, it is the duty of the sheriff to hold the de-

fendant in custody till he is discharged in due form, bringing him before the court on the return of the writ. *id*

7. At common law, a rule for commitment, made by a court of record, need not show the cause of commitment; but the revised statutes require that it should. *id*
8. It is enough, however, that the cause be substantially stated, though without technical precision; and the rule in this case, mentioning a previous order to pay money which the defendant had not complied with, sufficiently showed that the cause of commitment was for a contempt. *id*
9. *Semble*, a supreme court commissioner has not *jurisdiction* to discharge a defendant from custody because the proceedings for his commitment are *informal* merely. *id*
10. *Quere*, whether he can do so, in case of commitment for an alleged contempt by a superior court, for the reason that, in his judgment, the offence charged was not a contempt. *id*
11. The revised statutes have not taken away from courts of record their common law power of committing for contempts by *rule* merely, without other process. *id*
12. Though conceded, that, at common law, an *inferior court* cannot commit without a regular *warrant*. *id*
13. The statute provision as to a *precept* against one disobeying an order to pay costs, was designed to furnish a mode of proceeding less circuitous than that of the common law; and either mode may be adopted at the election of the party. *id*
14. The term *process*, as used in 2 R. S. 444, § 25, includes a *rule or order* of commitment. *id*
15. The legal signification of this term generally, discussed and illustrated. *id*

See HABEAS CORPUS, 1 to 3.

### CONTRACT.

See ASSUMPSIT.  
BILLS OF EXCHANGE AND PROMISSORY NOTES.



**See COVENANT.**

DEST.  
FRAUD.  
EVIDENCE, 15, 34 to 37.  
MARRIAGE.  
PROMISE.  
REDEMPTION, 5.  
RELEASE.  
STREETS, 10, 11.  
TURNPIKE LAW, 1.  
VARIANCE.  
WEIGHTS AND MEASURES

**CONVEYANCE OF LANDS.**

**See ASSUMPSIT, 7 to 9, 14.**  
DEED.  
FRAUDULENT CONVEYANCE.  
STREETS, 1 to 3, 5 to 7.

**CONVICTION, RECORD OF**

**See LARCENY, 5.**  
JURISDICTION, 7.

**CORPORATION.**

1. A municipal corporation is not liable for the misfeasance or nonfeasance of one of its officers, in respect to a duty specifically imposed by statute on the officer. *Martin v. The Mayor, &c. of Brooklyn,* 545
2. Otherwise, if the duty is imposed absolutely on the corporation, as such. *id*
3. The acts of an officer of a corporation, unless official, or within the compass of an agency delegated to him, are not binding on the corporation. *National Bank v. Norton, impleaded, &c.* 572
4. *Seemle*, that though an officer of a corporation has been irregularly removed, yet if there appear to have been good cause for removal, a mandamus will not lie to compel his restoration. *Ex parte Payne,* 665

**See ASSUMPSIT, 1 to 6.**  
BANKS, 1, 2.  
PARTNERSHIP, 7, 8.  
STREETS

**COSTS.**

1. In ejectment, the declaration contained three counts for the same premises,

in one of which the plaintiff claimed an estate in *dower* as widow, and in the others an estate *in fee* as heir at law, to all of which the defendant pleaded one plea of not guilty; and the plaintiff had a verdict on the count claiming *dower*, and the defendant on the other counts: *Held*, that the plea might be regarded as making a severable issue on such count, so as to entitle the defendant to costs on the matters found in his favor. *Crittenden v. Crittenden,* 359

2. Whether this rule would prevail, where the plaintiff sets up *the same title* under several counts claiming different degrees of interest in the land, and the defendant succeeds as to some of them, or, where there are counts upon the title of several plaintiffs, some of whom succeed, and the others fail, *quere. id*
3. On a writ of error to this court from the court for the correction of errors, the prevailing party is not entitled to charge *by the folio*, for copies of the points furnished on the argument in the latter court, but only the expense of printing them. *Belding v. Burlington,* 361
4. A person bringing an action in the name of another is liable under 2 R. S. 515, § 47, 2d ed. for the costs recovered against the nominal plaintiff, though his interest in the demand prosecuted is only by way of *mortgage* or *lien*. *Whitney v. Cooper,* 629
5. The person thus sought to be charged may show by parol the real nature of his interest, in contradiction of the terms of a written assignment to him, absolute on its face. *id*
6. No third person can be subjected to costs under the above statute, whatever may be the nature of his interest, and however much he may have interfered in the action, if in truth he is not chargeable with having brought it. *id*
7. One may be said to have brought the action, within the meaning of the statute, who has retained the attorney for that purpose, either individually or in conjunction with others, or sanctioned the act of an assumed agent in retaining him, or agreed to indemnify the nominal plaintiff for the expenses consequent upon the retainer. *id*



8. Whether a landlord, defending an ejectment in the name of his tenant, will be liable for the costs recovered by the plaintiff, *quere.* *Ryers and others v. Hedges,* 646

9. Where the alleged landlord, on a motion to compel him to pay the plaintiff's costs, admitted that he claimed title to the premises, and had aided in the defence, but showed by his own and other affidavits that he aided merely as counsel, the court denied the motion. *id*

10. As a general rule, though one person, for the protection of his own interest, defend an action in the name of another, he will not be liable for the plaintiff's costs. *id*

11. Where an ejectment suit was defended in the name of a tenant, at the instance and for the benefit of his landlord, the court refused, on motion of the tenant, to compel the landlord to pay the plaintiff's costs; especially, as the facts on which the motion rested were rendered doubtful by counter affidavits. *Livingston v. Clements,* 648

12. *Semble,* that a landlord defending a suit in the name of his tenant will under no circumstances be ordered to pay the costs recovered by the plaintiff; and that the case of *Jackson, ex dem. Martin, v. Van Antwerp,* (1 *Wend.* 295,) *contra,* has been overruled. *id*

13. Referees are not entitled to \$3 per day for services and expenses in settling a *special report* under the 71st rule of this court, but only the statutory fee for drawing and engraving the report. *Chichester v. The Agent of the Mount Pleasant State Prison,* 665

14. The statute allowing double or increased costs to officers, &c. (2 *R. S.* 512, 2d *ed.*) extends as well to *replevin* as to other actions. *Waring v. Acker,* 673

15. The costs, however, of a *special motion* in the progress of the cause, are not within the provision. *id*

See BAIL IN CIVIL CASES, 1.  
 CONTEMPT, 13 to 15.  
 COURT OF SPECIAL SESSIONS.  
 HABEAS CORPUS, 1.  
 PRACTICE, 28 to 30.  
 PRINCIPAL AND SURETY, 1 to 5.  
 SUPERVISORS, 6, 15.

## CO UNSEL

See ATTORNEY AND COUNSEL, 1, 2.  
 EVIDENCE, 4 to 13, 24.

## COUNTY CHARGE.

See SUPERVISORS.

## COURT OF A JUSTICE OF THE PEACE.

1. Much greater latitude is allowed in pleadings before justices of the peace, than in courts of record; especially in cases where the objection was not taken at the proper time. *Whitney v. Crim,* 61

2. Independently of the case of *Lovett v. Pell,* (22 *Wend.* 369,) the misjoinder of counts in a justice's court, is not a fatal defect, no objection being interposed until after verdict. *id*

3. Where W., a party to a suit before a justice of the peace, after the jury had retired to deliberate, told the justice in the presence of the other party, that the jury wished to see him, whereupon he entered the jury room alone, but held no conversation with them respecting the merits of the case; *held,* that what W. said to the justice, amounted to little, if any thing, short of an express consent; and the judgment having been against W., the court refused to interfere with it. *id*

4. The case of *Taylor v. Betaford,* (13 *Johns. R.* 487,) is an extreme one, and the court will not go beyond it. *id*

5. Where, after a jury had retired to deliberate, they came into court and requested the justice to read over the testimony of a certain witness, which he did, but owing to his not having taken down all the witness said, a part of it, only remotely relating to the merits, was not mentioned to the jury; *held,* that neither party having called the justice's attention to the omission at the time, it was not a ground for reversing the judgment, especially as there was no reason to suppose that the omission was intentional. *id*

6. There being some evidence to sustain the finding of a jury in a justice's

court, on a question of fact, the court cannot interfere with it, though they believe the jury erred. *id*

7 Matter of defence in a justice's court arising after issue joined, (e. g. a submission of the subject in controversy to arbitrators, followed by an award,) may be pleaded therein *puis darrien continuance*. *West v. Stanley*, 69

9. Pleadings in justices' courts are not required to be strictly formal, no objection having been there interposed to them on that ground. *id*

9 Where, on tendering a plea *puis darrien continuance* to a justice, the defendant offered to verify it by affidavit, and it was rejected on the ground that pleas of that nature could not be received in a justice's court; *held*, that the justice erred, and the judgment should be reversed, though no affidavit was, in fact, made. *id*

10. A justice of the peace whose wife is the sister of A.'s wife, cannot take jurisdiction of a cause in which A. is the plaintiff in interest, though prosecuted in the name of another; and if he render judgment therein, it may be treated as absolutely void. *Foot v. Morgan*, 654

See COURT OF SPECIAL SESSIONS.  
DEMURRER TO EVIDENCE, 9.  
JUSTICE OF THE PEACE.  
OFFICER, 2 to 7.

## COURT OF A NEIGHBORING STATE.

See BAIL IN CIVIL CASES, 3 to 6.  
DEBTORS, ABSCONDING, CONCEALED,  
&c. 3, 4.  
PLEADING, 26 to 28.

## COURT OF ERRORS.

How far a decision of the court for the correction of errors is to be regarded as a precedent binding upon other courts, discussed and considered. *Butler & Barker v. Van Wyck*, 438

See COSTS, 3.

## COURT OF SPECIAL SESSIONS.

1. The right of a court of special sessions to take from the complainant a bond

as security for costs, pursuant to 2 R. S. 597, § 20, 2d ed. depends upon a previous condition; viz. an acquittal by legal authority, not a conventional one. *Germond and another v. The People, ex rel. &c.* 343

2. Where a bond of this nature was taken on the discharge of S. accused of an assault and battery, and in an action upon it the defendants pleaded, that S. having demanded of the special sessions a trial by jury, three jurors appeared, who alone heard the evidence and pronounced S. not guilty, whereupon the justices certified, &c.; *Held*, that a replication alleging this form of trial to have been adopted by agreement between the people's counsel, the complainant and S., whereupon, &c. was bad, as not showing any acquittal by the court. *id*

3. Otherwise, *semble*, had it appeared by the replication, that after the rendition of the pretended verdict, the court acted on it, and pronounced an acquittal; for then, though the proceeding might have been *erroneous*, it would not have been absolutely void. *id*

4. The rule that consent will not confer jurisdiction, applies as well to consent in creating a tribunal, as to consent in submitting a matter to a subsisting tribunal which the law has excluded from its cognizance. *id*

5. The complainant in a court of special sessions is a party, as it respects the question of costs. *id*

6. *Semble*, that the defendant's right to a jury trial in a court of special sessions, may be waived by agreement at any time before judgment, and he be tried by the justices. *id*

## COVENANT.

The plaintiff, a man of advanced age, transferred a house and some other property to the defendant and another, his two sons, they covenanting to pay his debts, amounting to within \$450 of the value of the property, and to support him during life; also to "keep and maintain" his two younger children, one of whom was J. then eleven years old, until they should respectively arrive at the age of twenty-one, "in a manner suitable for the said P. (the plaintiff,) to provide for them in case

he should live and had not conveyed away his property." J. having remained with the defendant six years under this arrangement, left him and had not since returned. *Held*, that the plaintiff could not recover for J.'s board or clothing after he had thus left, the covenant, in effect, only binding the defendant and his brother to provide for him *as a member of the family*: especially, as it did not appear that the plaintiff had incurred any expense on J.'s account, or that the latter had at all suffered for want of aid. *Pool v. Pool*, 580

See DAMAGES, 1, 2.  
DEBT, 1.  
INSURANCE, 3.  
PLEADING, 1 to 3, 7.  
SCIRE FACIAS, 2, 4.  
WITNESS, 5, 6.

### COVERTURE.

See DEED, 4, 5, 9, 10.  
EVIDENCE, 44.  
MARRIAGE.  
WITNESS, 1 to 4.

### CRIMES

1. An alien, in whatever manner he may have entered our territory, is amenable criminally for offences committed here. *The People v. Alexander McLeod*, 377
2. The right of using violence in self defence, only arises where one is forcibly assailed. *id*
3. To excuse homicide in self defence, the act must be premeditated. *id*
4. The right of resorting to force, upon the principle of self defence, does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury. *id*
5. A subject of Great Britain, who, under directions from the local authorities of Canada, commits homicide in this state, in time of peace, may be prosecuted in our courts, as a murderer; even though his sovereign subsequently approve his conduct, by avowing the directions under which he did it as a lawful act of government. *id*

6. Where a citizen of Canada has been arrested for a crime committed in this state, which his sovereign subsequently approves, the jurisdiction of our courts in respect to him is not superseded by the fact that the whole matter has become the subject of diplomatic negotiation between the United States and Great Britain. *id*

7. Whether an actual exertion of the treaty-making power as between the two nations, could deprive our courts of jurisdiction in such case, *quere*. *id*

8. The rule in England, that in cases of hostile invasion by private persons, the common law courts can take no jurisdiction of them, rests on a distribution of judicial power unknown to our law. *id*

See CONSTITUTION, 1, 2.  
COURT OF SPECIAL SESSIONS.  
EVIDENCE, 26.  
HABEAS CORPUS, 4 to 10.  
LARCENY.  
NOLLE PROSEQUI.  
OFFICER, 1, 9, 10.  
PRACTICE, 3 to 6.  
RAPE.  
SUPERVISORS, 7.  
WARRANT OF ARREST OR COMMITMENT.  
WITNESS, 10.

### CRIMINAL CONVERSATION.

See WITNESS, 1 to 10.

### CUSTOM.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 33.

## D

### DAMAGES.

1. Under the rule in *Kinney v. Watte*. (14 *Wendell*, 41,) it seems, a lessee, with covenant for quiet enjoyment, not having paid any purchase money, can only recover nominal damages on the covenant, in case of eviction, with the costs, &c. disbursed in defending the title. *Moak v. Johnson*, 99
2. Even were that case to be revised, the lessee, it seems, could only be allowed

to recover. *See* *Bank of Rome v. Curtiss, sheriff, &c.* 275

3. In an action against a sheriff for neglecting to levy and return an execution, it appearing that the defendants, or some of them, had sufficient property out of which he might have satisfied it; *held*, that he was liable *prima facie* for the whole amount due on the judgment, and it is no answer that the defendants are still able to pay. *Bank of Rome v. Curtiss, sheriff, &c.* 275

The sheriff may mitigate the damages in such action, by showing that he was unable to collect by an exercise of proper diligence, as, if the defendant in the execution was insolvent; or, he may show that the plaintiff himself was the cause why the whole was not collected. *id*

*See* BILL OF EXCEPTIONS, 4.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 11 to 14.  
FRAUD, 28 to 32.  
PRACTICE, 62.  
PRINCIPAL AND SURETY, 1 to 5.  
STREETS.

## DEBT.

An action of debt will not lie for the breach of a sealed contract to pay a note, and save the plaintiff harmless and indemnified therefrom, where the amount of the note does not appear in the contract. *Long v. Long*, 597

*See* BAIL IN CIVIL CASES.  
PLEADING, 13 to 15, 17, 26 to 29.  
PRACTICE, 62.

## DEBTORS, ABSCONDING, CONCEALED AND NON-RESIDENT.

1. Proceedings by attachment under the statute relating to absconding, concealed, and non-resident debtors, may be instituted by assignees of the demand sought to be collected, in *their own names*, and the bond executed by the debtor and his sureties, on applying for a discharge of the attachment, will be valid though drawn in the same way. *Bealey, &c. v. Palmer, &c. impleaded.* *Id.* 482

2. An attachment under that statute does not lie on a judgment rendered by the court of a neighboring state. *id*
3. Nor will it lie on the original contract debt for which such judgment was recovered. *id*
4. The judgment of a court of a neighboring state is no less effectual in extinguishing the demand on which it was rendered, than the judgment of a court strictly domestic. *id*

## DEBTOR AND CREDITOR.

*See* ACCORD AND SATISFACTION, 1.  
DEBTORS, ABSCONDING, CONCEALED, &c.  
FRAUD, 22 to 27.  
FRAUDULENT CONVEYANCES.  
NEW TRIAL, 5 to 7.  
PROMISE.  
REDEMPTION.  
RELEASE, 1 to 4.  
WITNESS, 7, 8.

## DECLARATIONS.

*See* EVIDENCE, 50, 51.

## DECREE OF SALE BY SURROGATE.

*See* SURROGATE.

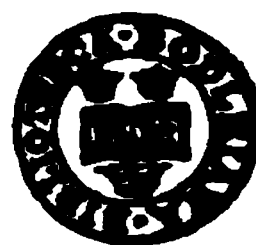
## DEDICATION.

*See* STREETS, 1 to 3, 5 to 7.

## DEED.

1. Where S., owning the entire interest in certain premises subject to C.'s right of dower, gave a deed thereof, reserving the equal undivided third part that is covered by the dower right of C.; *held*, that the grantee took the whole premises subject to the right of dower, and not merely two thirds. *Swick v. Sears*, 17
2. A sheriff's deed, given after the sale becomes absolute, takes effect by relation from the time when it might have

- been demanded. *Semble. Klock v. Cronkhite,* 107
3. A deed of lands by an infant, is voidable merely—not void. *Gillet and others v. Stanley,* 121
4. Such deed, executed by a *feme covert*, without her husband, and not acknowledged by her on a separate examination, &c. as required by the statute, is absolutely void. *id*
5. The act of 1809, declaring certain deeds by *Indian heirs* valid, if executed with the approbation of the surveyor general, was not intended to affect either of the above disabilities; and hence, a deed by an Indian heir, though made with the surveyor general's approbation, is open to the same objections, on the ground of the *infancy* or *coverture* of the grantor, as deeds executed by others. *id*
6. A certificate of the probate of a deed, under 1 R. L. 369, § 1, should show expressly that the person who testified to the fact of execution was a subscribing witness. That his name is identical with one appearing in the attestation clause is not enough. *id*
7. And a certificate stating that the witness testified to the grantor's having *duly executed the deed*, without indicating how the witness came to know the fact, is insufficient. *Semble*, it should show, either that the witness saw the execution, or heard it acknowledged when he subscribed. *id*
8. A deed of lands by assignees of an insolvent, appointed under the act of 1811, is invalid unless executed by a majority. *id*
9. Notice to a husband, at the time of receiving a conveyance to himself and wife, of a prior unregistered mortgage on the land conveyed, will not operate as notice to the wife, so as to give the mortgage a preference in respect to her title; especially where she pays the whole consideration for the conveyance out of her separate estate. *Snyder v. Sponable,* 567
10. Otherwise, if the consideration is paid by the husband out of his own funds, and he takes a conveyance to himself and wife, or to her alone, either by way of advance, or for the purpose of defrauding creditors. *id*
11. On a conveyance to two or more as joint tenants or tenants in common, notice to one of them of a prior unrecorded mortgage, will not affect the rest, except in the case of a trust estate. Otherwise, where the one receiving notice is agent for the rest. *id*
- See ASSUMPT, 7 to 9.  
BOND.  
COVENANT.  
DEBT.  
ESTOPPEL, 1.  
EVIDENCE, 3, 39, 40, 44, 48, 49.  
FRAUDULENT CONVEYANCES, 1, 2.  
INSOLVENT.  
MORTGAGE OF LANDS.  
POWER.  
REDEMPTION.  
RELEASE.  
STREETS, 1 to 3, 5 to 7.  
SURROGATE, 1 to 10.
- DEFENDANT IN INTEREST.  
*See Costs, 8 to 12.*
- DELIVERY OF INSTRUMENTS  
*See ARBITRATION AND AWARD, 11 to 15*  
ASSUMPT, 10, 13.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 11.
- DEMURRER TO EVIDENCE.
1. On a demurrer to evidence, every conclusion which the jury would have been warranted in drawing from the testimony given, must be considered as admitted by the party demurring. *The People v. Roe,* 470
2. Where the defendant was prosecuted for a penalty under the act of April 15th, 1839, regulating the speed of steamboats in passing the wharves at Albany; and, for the purpose of identifying him as the person in charge of the boat at the time, a witness swore that the defendant was captain of her during that season, and also on the day upon which the alleged offence was committed, but he did not know whether the defendant was on board when she passed the wharf as charged. *Held*, on demurrer to the evidence, that it was sufficient to warrant judgment for the prosecution. *id*



3. The nature and office of a demurrer to evidence, considered. *id* 471, note (a)

4. A joinder in demurrer cannot be compelled, where the evidence is doubtful, conflicting or circumstantial, unless the party demurring will distinctly admit every fact and conclusion against himself which the evidence tends to establish. *id. note (a)*

5. The case made by a demurrer to evidence is in many respects like a special verdict; which must state facts, and not the mere evidence of them. *id. note (a)*

6. Where the party against whom the demurrer is interposed joins therein, without insisting on distinct admissions from the other side, the court will proceed and draw the same inferences against the demurrant, which the jury might have drawn; and if upon any view of the facts a verdict against him would have been sustainable, judgment will be rendered accordingly. *id. note (a)*

7. *Semble*, that if there be a joinder without such admissions, leaving the facts loose and indeterminate; it is a sufficient reason for refusing judgment upon the demurrer, and for ordering a trial *de novo*. *id. note (a)*

8. The better opinion seems to be that a bill of exceptions will not lie for the court refusing to compel a party to join in demurrer; it being matter resting mainly in discretion. *id. note (a)*

9. A demurrer to evidence is a proceeding inapplicable to a justice's court. *id. note (a)*

## DEMURRER TO PLEADING.

See ABATEMENT, 1 to 3, 5.  
PLEADING.

## DEPOSIT, CERTIFICATE OF.

See ASSUMPSIT, 10 to 13.

## DEPOSITION.

1. Where there was a stipulation between the attorneys, that either party might

receive the return of commissioners authorized to take testimony, duly sealed, and deliver it to the clerk, which was done; *held*, no objection to the reading of the testimony, that the direction on the return did not specify the clerk's residence, as required by 2 R. S. 394, § 16, subd. 4. *Williams v. Eldridge and others*, 249

2. *Quere*, whether the form of the direction be essential in any case, where the commissioners' return in fact reaches the proper officer's hands? *id*

3. The deposition in this case was held properly read in evidence, though it did not appear that a copy of § 16 of said statute had been annexed to the commission. *id*

4. If annexing a copy of that section were essential, the court, *it seems*, would intend it to have been done, unless the contrary were shown. *id*

5. It will be presumed that the commissioner who took the testimony, closed and sealed the package himself. *id*

6. That the papers composing the return are connected by *wafers* only, is not an objection to the deposition being read. *id*

7. It need not appear by the return to a commission, that the oath was *publicly administered* to the witness, as that will be presumed to have been regularly done. *id*

8. A commissioner to take testimony, is *quoad hoc* an officer of the court in which the proceeding is pending; and his signature, like that of the clerk to an office copy, will be judicially noticed, though his name be not written at length. *id*

9. On the same principle, the court will presume that the commissioner discharged his duty, by doing all those things in the execution of the commission which he is not bound specifically to certify as done. *id*

10. Where several objections were made to the reading of a deposition, which the court, after taking time to deliberate, overruled; *held*, that they had no right to preclude the party from raising other objections afterwards. *id*

11. The objection to an interrogatory annexed to a commission, on the ground of its being leading, may be made when the answer of the witness is proposed to be read in evidence; especially, when the interrogatories are annexed under a stipulation expressly *saving all legal exceptions.* *id*

12. When a commission is directed to two, either or both of whom being authorized thereby to execute it, and the return is signed by only one of them, it will be presumed that he alone was present at its execution, though the words, "by virtue of a commission to us directed," appear in the caption of the return. *id*

13. It is not a ground of error, *semble*, that the court at the trial allowed a leading question to be put by a party to his own witness, as that is matter resting in discretion; otherwise, in respect to answers to leading interrogatories annexed to a deposition. If these are objected to on that ground, the court are bound to exclude them. *id*

*See PRACTICE, 49, 50.*

#### DEPUTY.

*See BOND, 1 to 3.*  
POSTMASTER.

#### DEVISE.

*See WILL, 1 to 7.*

#### DEWISEE RESIDUARY.

*See WILL, 1 to 7.*

#### DIPLOMACY.

*See CRIMES, 6, 7.*

#### DIRECTOR

*See PARTNERSHIP, 7, 8.*

#### DISORDERLY PERSONS.

*See CONSTITUTION, 1, 2.*

#### DISSOLUTION

*See PARTNERSHIP, 3 to 9.*

#### DISTRESS.

Property in a boarding-house, though belonging to a boarder, is not exempt from distress for rent, if it be in the actual possession and use of the tenant, by permission of the boarder, and without the consent of the landlord. *Mat. thews v. Stone,* 566

#### DISTRICT ATTORNEY

*See NOLLE PROSEQUI*  
OFFICER, 13, 14  
SUPERVISOR, 15.

#### DIVORCE.

*See WITNESS, 1 to 7*

#### DOOR.

*See OFFICER, 8 to 12.*

#### DOUBLE COSTS.

*See COSTS, 14, 15.*

#### DRAKE'S BRIDGE.

*See SUPERVISORS, 1 to 7.*

#### DUE BILL.

*See BILLS OF EXCHANGE AND PROMISSORY NOTES, 17.*

#### E

#### EJECTMENT.

1. If a defendant in ejectment sets up that he is tenant in common with the plaintiff with a view of putting the latter to proof of an ouster, he must connect himself with the title under



which the plaintiff claims. *Gillet and others v. Stanley*, 121

2. But he may show title out of the plaintiff, and thus defeat the action, without connecting himself with it. *id*

3. A declaration in ejectment, alleging a joint title in several, is not supported by proving title in some of them. *id*

4. Nor will a title in two surviving assignees of an insolvent, support a count averring title in one. *id*

5. And if the title is in A. as surviving assignee, it is wrong to describe him as one of the surviving assignees: but a trifling misdescription like this may be disregarded at the circuit, and is curable by subsequent amendment. *id*

6. Under a declaration claiming the whole interest in certain premises, the plaintiff cannot recover an undivided share. *id*

7. The plaintiff, on obtaining a new trial in ejectment, was allowed to amend his declaration, so as to conform it to his title as appearing on the former trial. *id*

8. A defendant in ejectment, not having entered under the plaintiff, may show title out of the latter, without connecting himself with it. *Bloom and others v. Burdick*, 130

See COSTS, 1, 2, 8 to 12.  
EVIDENCE, 44.  
IDIOTS, LUNATICS, &c. 2, 3.  
WITNESS, 5, 6.

### ELECTION OF ACTIONS.

See ASSUMPSIT, 10.  
FRAUD, 3, 7, 12, 16, 28 to 32.  
IMPRISONMENT, 1, 2.  
INSURANCE 3, 4.  
TORT, WAIVER OF.

### ENDORSER AND ENDORSEE.

See ASSUMPSIT, 10 to 13.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 5, 6, 8 to 10, 15, 16, 19 to 33, 36, 44 to 46.  
JUDGMENTS AND EXECUTIONS, 7, 8.

### ENTITLING PAPERS.

See PRACTICE, 32, 33.

### ERROR.

1. A party injured by a judgment, may claim to have it reversed, though rendered in his own favor. *Parker v. Newland*, 87

See BILL OF EXCEPTIONS, 1 to 4.  
CONTEMPT, 3, 4, 9.  
COSTS, 3.  
COURT OF ERRORS, 1.  
COURT OF A JUSTICE OF THE PEACE.  
DEMURRER TO EVIDENCE, 8.  
DEPOSITION, 13.  
JURISDICTION, 6, 8.  
SURROGATE, 1.

### ESTOPPEL.

A grantor in a deed to the defendant, containing a clause which he now claims reserved to him an undivided third of the premises, subject to dower, stood by, subsequent to its execution and when the defendant purchased of the widow and others, advised the purchase, and declared it would pass the third part reserved. Yet held, that he was not thereby estopped, at law, from asserting his present claim. *Swick v. Sears*, 17

See ARBITRATION AND AWARD, 1 to 5, 8, 16, 26, 27, 30.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 28, 36 to 38.  
BOND, 7.  
EVIDENCE, 42, 43, 44.  
FIXTURES, 3, 4.  
JURISDICTION, 9.  
SCIRE FACIAS, 5.  
SUPERVISORS, 8, 9, 13, 15.

### EVIDENCE.

1. The intention of an act done, must be judged by its necessary consequences. Where these are directly pernicious, the intent to work mischief becomes a conclusion of law. *Safford v. Wyckoff, president*, &c. 11

2. It seems, the court cannot take judicial notice that a bank is one organ-



- zed under the general banking law, but the fact must be proved. *id*
3. Parol evidence of what the parties to a deed of lands agreed and declared, at the time of its execution, with respect to the effect of a clause of reservation contained in it, is inadmissible to aid or control its construction. After ascertaining what the state of things was, which existed at the time the deed was executed, it must be left to speak for itself. *Swick v. Sears*, 17
  4. In general, confidential communications between attorney and client, concerning the matter to which the retainer relates, are not to be disclosed by the attorney in court, unless the client waives his privilege. *Coveney v. Tannahill*, 33
  5. The form of the communication, as whether by an oral statement, or by delivering a written instrument, makes no difference in the application of the rule. *id*
  6. An attorney may be called against his client to prove the existence of a paper deposited with him by his client, and that it is in his possession, with a view to enabling the party calling him to resort to secondary evidence. But he cannot be compelled to produce the paper or state its contents. *id*
  7. An attorney cannot be compelled, on *subpœna duces tecum*, to produce the papers of his client entrusted to him. *id*
  8. The privileged relation of attorney or counsel, and client, can only exist, it seems, for lawful purposes; and hence, if the client confide to them a criminal design, or they be present when a wrong, either public or private, is done by their client, their knowledge thus acquired is not privileged. *id*
  9. An attorney who is present at a transaction in the way of business between his client and a third person, is not privileged as to what then passed. *id*
  10. When the facts are disclosed, it is for the court, and not the witness to decide whether he is privileged or not. *id*
  11. Where an account stated, containing a written acknowledgment of a balance due the defendant from T., E. and M., partners, was introduced in evidence to charge all of them, though it was signed by T. alone; and the other partners set up that it was signed by T. in fraud of their rights, after an injunction served upon T., at their suit, restraining him from interfering with the partnership accounts; and S., the plaintiff's counsel, was called by E. and M., and asked *whether he was present when the account stated was signed, and when and where it was signed, and who were present*; HELD, that the matters propounded did not come within the rule as to privileged communications, and that S. was bound to disclose all that was said or done between T. and the plaintiff, on the occasion alluded to, so far as either was pertinent to the issue. *id*
  12. If, however, any communications passed between the plaintiff and S. the counsel, apart from T., they, it seems, would be privileged. *id*
  13. And held, moreover, that S. was privileged from answering, whether, *when he first saw the account stated, the evidence of a settlement was endorsed on it*. *id*
  14. A note cannot be contradicted or controlled in its legal effect, by oral evidence that it was to have no validity except in a certain event. *Payne v. Ladue*, 116
  15. Where the action was for the breach of a contract to furnish timber; the defence, a failure of the plaintiff to make a certain money advance, which the contract bound him to make before the work commenced, *if called for*; and the case finally turned upon the sole question whether the advance had or had not been *called for*, as to which the evidence was quite conflicting; held, that on this point the *onus probandi* was upon the defendant; and the judge having charged that *the jury ought not to find against the defendant if they had reasonable doubts in respect to it*, a new trial was ordered. *Hollister and another v. Bender*, 150
  16. Upon *non-assumpsit* pleaded, though the *onus* is on the plaintiff to show a promise; yet, *semble*, in respect to matter of defence which, though proper under that issue, does not come in by way of rebutting the plaintiff's evidence merely, (e. g. payment, release, accord and satisfaction, &c.) the defendant has the *onus*. *id*

17. It can make no difference, whether the defence springs out of the contract sued on, or arises *aliunde*. *id*
18. The substance of the allegation *to be tried*, rather than the particular shape of the pleadings, must determine where the *onus* lies; especially, in cases where the defendant is not required to plead the matter intended to be relied on. *id*
19. The defence in this case was, *it seems*, a proper subject for a special plea. *id*
20. Where one party to a suit is sworn to prove the loss of a written instrument, with a view to secondary evidence, though the adverse party may be examined to disprove the loss, and account for the instrument, yet he cannot, under color of this right, give testimony denying directly or indirectly the former existence of the instrument, or the matters designed to be evinced by it. *Woodworth v. Barker*, 172
21. The party affirming the loss, cannot be sworn until after the former existence of the instrument has been established by independent evidence; and when sworn, his testimony, as well as that of his adversary, is, in general, to be confined to the single question of loss. *id*
22. *Quere*, however, whether the parties may not in certain cases go beyond this, and even present a case of conflicting testimony between them, so blended with other matters, as to render the whole a jury question. *id*
23. But in general, testimony relating to the loss of an instrument, with a view to secondary evidence, is to be addressed to, and passed upon, by *the court*, and not *the jury*. *id*
24. Counsel have an unqualified right to raise what number of objections they please to the admission of testimony; and it is the duty of the court to hear and decide them. *Williams v. Eldridge and others*, 249
25. The party who calls a witness to prove that his adversary has admitted an account, may put it into the witness' hands, and then ask him the proper questions. *id*
26. The presumption of innocence is almost as strong, in respect to alleged acts of immorality, as in respect to the commission of crime. *Starr and others v. Peck*, 270
27. Breach of private duty, negligence, fraud, &c. are not to be presumed. *id*
28. One of the plaintiff's witnesses in an action of slander left court without his consent, and did not return until all the other witnesses on both sides had given in their testimony. He was then offered by the plaintiff to prove slanderous words laid in the declaration, other than those before attempted to be proved, but the circuit judge refused to allow him to testify: *Held*, that it was *discretionary* with the circuit judge to admit the witness or not, and that this court could not interfere to regulate the exercise of his authority. *Ford v. Niles*, 300
29. Regularly, the party entitled to begin, at the circuit, must exhaust all the testimony in support of his side of the issue, before the opposite party is heard; and can introduce no evidence afterwards, save in reply. *id*
30. The circuit judge, however, may, in his discretion, allow a departure from this rule; but the party cannot claim that he shall do so, as a matter of right. *id*
31. The plaintiff's title to personal property being assailed as fraudulent, in respect to creditors, he called one of his vendors, and put him the following question: "So far as you are concerned, was there any actual fraud in the whole transaction?" *Held*, irrelevant, as being an inquiry after the secret operations of the witness' mind, which could not affect the case one way or the other. And *semble*, the question was also objectionable as being *leading*. *Hanford v. Artcher*, 347
32. A chattel mortgage dated in 1837, appointing a day in 1830 for payment, is in legal effect payable immediately; and, as between the parties, oral evidence is inadmissible to vary its operation. *Fuller v. Acker*, 473
33. Otherwise, as between the mortgagee and a judgment creditor assailing the mortgage as fraudulent. The former, for the purpose of repelling the fraud, may show the day of payment intended, and that the error occurred through inadvertence or mistake of the draftsman. *id*

34. Where a contract is entered into for the delivery of barley at a particular place and by a given day, specifying the price, but no time of payment, the vendee, in an action for non-delivery, must aver and prove that he was ready and willing to accept and pay. *Coonley v. Anderson*, 519
35. But if the evidence shows he was ready at the appointed time and place to perform on his part, and the defendant did nothing, this is enough to sustain the averment, without proving either a demand, or that he tendered or exhibited the money. *id*
36. The averment of readiness to accept and pay, in such cases, does not require direct proof, but may be maintained by circumstantial evidence. *id*
37. And *semble*, where a witness called in support of the averment has testified positively, but generally, that the vendee was ready to accept and pay, &c. the court cannot refuse to submit the cause to the jury, though on a cross-examination the witness stated he did not know of the vendee having money for the particular purpose on that day, but knew he had money about that time, &c. *id*
38. An exemplification of the record of a will merely, without the proofs, cannot be received in evidence. The whole record (including the proofs) must be certified. *Morris v. Keyes*, 540
39. A transcript of the record of a deed, without a transcript of the certificate of probate or acknowledgment, is not evidence. *id*
40. Neither the record of a deed or will is more than *prima facie* evidence of the authenticity of the original. *id*
41. To show a fine levied under the act of 1787, the original record of the proceedings in this court, or an authenticated copy thereof, must be resorted to. *id*
42. In a suit by an assignee of a note not negotiable, brought against the maker in the payee's name, the defendant, under pleas of payment and of a set-off, gave in evidence a receipt in full as to the note, and also a note against the payee: *Held*, that the plaintiff, under general replications denying these pleas, could not prove the defendant's receipt and note to have been obtained by him after he had been duly notified of the transfer of the demand sued on; but to render these facts available, the replication should have been special. *Say v. Dascomb*, 552
43. If the defence of payment had arisen before the transfer of the note sued on, and the assignee had taken it on the faith of the defendant's representation that it was good, he would have been estopped from setting up the payment; and in such case, *semble*, the facts constituting the estoppel might be shewn under the general replication. *id*
44. A conveyance of lands was made to a husband and wife, upon which there existed a prior unrecorded mortgage. The mortgage was afterwards foreclosed, and the purchaser under it sued the husband in ejectment, and recovered. The latter having died, the wife brought ejectment against one in possession under the foreclosure; and, on the trial, the defendant offered the former recovery against the husband in evidence, together with proof that it was obtained on the ground of his having been duly notified of the mortgage, when he and his wife purchased. *Held*, not admissible. *Snyder v. Sponable*, 567
45. The legal effect of a transaction as manifested by several distinct written instruments relating thereto, all executed at the same time, can no more be varied or contradicted by parol evidence than if the whole were embraced in one instrument. *Hull v. Adams*, 601
46. Accordingly, the plaintiff being the assignee of a lease, and bound by covenant with the lessee to pay the rents, &c. assigned the same to the defendant by writing expressing a consideration of \$3000; whereupon the latter obligated himself by another writing to perform all covenants which the plaintiff had entered into with the lessee, and also executed to the plaintiff, at the same time, two notes, one promising to pay him \$2000, and the other \$1000: *Held*, that the writings taken together imported an undertaking by the defendant to pay the whole rent, and therefore evidence could not be received to show a contemporaneous parol agreement by which the plaintiff was to pay a part, he accepting the \$1000 note for his indemnity in so doing. *id*

47. Otherwise, however, had the question stood solely on the consideration clause in the assignment. *id*

48. In ejectment by the grantee in a deed absolute on its face and recorded as such, against persons claiming by deed subsequent from the same source; *held*, that the plaintiff's recovery might be defeated by oral evidence that his deed was intended as a mortgage, though the evidence did not consist directly of facts occurring when the deed was executed, but mainly of the grantor's declarations made long afterward, importing a defeasance of some kind, but entirely indefinite as to the terms of it. *Webb v. Rice and another*, 606

49. Bronson, J. dissented, holding that, even in a court of equity, oral evidence to contradict the terms of a deed should not be received, except on the ground of fraud or mistake; and that, at law, such evidence ought in no case to be admitted. He, moreover, regarded the evidence relied upon in the present instance as especially objectionable, and wholly insufficient. *id*

50. The doctrine of *Kent v. Walton*, (7 *Wendell*, 256,) *Whitaker v. Brown*, (3 *id.* 490,) and other kindred cases holding, that declarations made by the payee of a promissory note, while he was the owner, are not admissible to affect one to whom he subsequently transfers it, doubted, but confirmed upon the principle of *stare decisis*. *Beach v. Wise*, 612

51. It forms no ground of exception to the general rule excluding such declarations, that the declarant is dead at the time of the trial. *id*

See ARBITRATION AND AWARD, 8 to 10, 17, 20, 1, 25 to 28, 30.  
ASSUMPSIT, 4 to 8, 16.  
ATTORNEY AND COUNSEL, 2.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 28, 35, 39, 41 to 43.  
BILL OF EXCEPTIONS.  
CANAL COMMISSIONERS, 8.  
CONTEMPT, 2, 3.  
COSTS, 5.  
DAMAGES, 3, 4.  
DEED, 6, 7.  
DEMURRER TO EVIDENCE.  
DEPOSITION.  
EJECTMENT.  
FRAUD, 1, 3, 19, 22 to 27.  
HABEAS CORPUS, 4 to 8.

See INQUEST, 1, 2, 3.  
JURISDICTION.  
LIEN.  
MARRIAGE.  
PARTNERSHIP, 7, 8.  
PLEADING, 11.  
PRACTICE, 4, 46, 49, 50.  
PRINCIPAL AND AGENT, 1 to 3.  
PRINCIPAL AND SURETY, 2, 3, 6.  
PROMISE, 3 to 6.  
RELEASE.  
SCIRE FACIAS, 5.  
STREETS, 4.  
SUPERVISORS, 9 to 11.  
SURROGATE.  
USURY, 6 to 9.  
VARIANCE.  
WAR AND PEACE, 1, 8.  
WITNESS.

## EXAMINATION OF WITNESSES

See DEPOSITION.  
EVIDENCE, 4 to 13, 20 to 23, 25, 31.  
INQUEST.  
USURY, 6, 7.  
WITNESS, 10 to 12.

## EXCISE.

A town board of excise, until the actual entry of a resolution pursuant to 1 *R. S.* 677, § 3, 2d ed., have a large discretion to exercise on the question of granting and refusing licences, which this court will in no case attempt to control. *Ex parte Persons*, 655

## EXECUTION.

See DAMAGES, 3, 4.  
IMPRISONMENT.  
JUDGMENTS AND EXECUTIONS.  
LEVY.  
OFFICER, 8 to 12.  
SHERIFF.

## EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATOR, 1  
ASSUMPSIT, 3.  
POWER, 1 to 3.  
SURROGATE.

## EXEMPLIFICATION.

See EVIDENCE, 38 to 41.

**EXEMPT PROPERTY.**

*See* DISTRESS.

**EXTINGUISHMENT.**

*See* JUDGMENT, 1 to 3, 7, 8.

MORTGAGE OF LANDS, 1 to 3.

**F****FALSE IMPRISONMENT.**

*See* IMPRISONMENT.

PLEADING, 8 to 12.

**FALSE OR FRIVOLOUS PLEA OR NOTICE.**

*See* PRACTICE, 34, 35, 54 to 56, 63 to 65.

**FALSE PRETENCES.**

*See* FRAUD, 1 to 9, 12 to 21.

LARCENY, 6, 7.

**FEEs.**

*See* BOND, 1 to 3.

COSTS, 13.

JUSTICE OF THE PEACE.

MONEY LENT.

OFFICER, 1, 13, 14.

SUPERVISOR, 15.

**FEME COVERT.**

*See* DEED, 4, 5, 9, 10.

EVIDENCE, 44.

MARRIAGE.

PRINCIPAL AND AGENT, 4.

WITNESS, 1 to 4.

**FIERI FACIAS.**

*See* DAMAGES, 3, 4.

JUDGMENTS AND EXECUTIONS.

LEVY.

OFFICER, 8 to 12.

PRACTICE, 64, 65.

SHERIFF.

**TENDER OF PROPERTY.**

*See* LARCENY, 1, 2.

**FINIS.**

*See* EVIDENCE, 41.

**FIXTURES.**

1. *Prima facie*, a building erected by one person on another's land, is to be treated as a fixture, and a part of the realty. *Smith & Britton v. Benson & Peck*, 176

2. But if it be so erected, under an understanding or agreement that it may be removed at any time, it is then no part of the realty, but personal property; for the conversion of which trover will lie; especially where it is only slightly fixed to the freehold. *id*

3. One deriving title from a person who had previously mortgaged a building, so erected, as personal property, is not in a situation to insist, as against the mortgagee, that it is a part of the freehold. *id*

4. Nor is he at liberty to dispute the title of the mortgagor. *id*

**FORECLOSURE.**

*See* ASSUMPT, 7 to 9, 14.

MORTGAGE OF LANDS.

**FOREIGN JUDGMENT.**

*See* DEBTORS, ABSCONDING, CONCEALED &c. 3, 4.

PLEADING, 26 to 28.

**FOREIGN LAW.**

*See* MARRIAGE, 2.

WAR AND PEACE.

**FOREIGN RECOGNIZANCE.**

*See* BAIL, 5, 6.

**FOREIGN SOVEREIGN.**

*See* CRIMES, 5 to 7.

WAR AND PEACE, 1 to 6.

**FORGED ENDORSEMENT.**

See ASSUMPSIT, 10 to 13.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 25 to 32.

**FORMER SUIT OR AWARD.**

See ARBITRATION AND AWARD, 1 to 6, 8 to 30.

DEBTORS, ABSCONDING, CONCEALED, &c. 3, 4.

EVIDENCE, 44.

JUDGMENTS AND EXECUTIONS, 9.

PRINCIPAL AND SURETY, 1 to 5.

SCIRE FACIAS.

**FRAUD.**

1. A member of an insolvent partnership at Syracuse, consisting of two persons, purchased goods in Philadelphia on the credit of the firm, under a misrepresentation of its circumstances. The goods were forwarded to Syracuse, but before they arrived, the partner not privy to the purchase, apprized the vendors by letter, of the insolvency of the firm, and, among other things, declared the goods subject to their order. The vendors, thereupon, took immediate steps to reclaim the goods, and actually succeeded as to part: The residue, however, before the vendors found them, were seized and sold by the sheriff of Schenectady, while lying in a warehouse at that place. In an action by the vendors against the sheriff, *held*, that the case should have been submitted to the jury on the question, whether there was such fraud in the purchase as avoided the sale; and a new trial was granted, because the circuit judge nonsuited the plaintiffs. *Ash & Annors v. Putnam*, 302

2. A purchase of goods with a preconceived design not to pay for them, is such a fraud as will avoid the sale. *id*

3. Where a sale of goods is procured by fraud, the vendor still retains his legal right in them, unless, after discovering the fraud, he assent to the act of sale, either positively, or by such delay in reclaiming the goods as authorizes the inference of an assent. *id*

4. As a general rule, a vendee of goods who, by reason of fraud in the purchase,

has acquired no title as against the vendor, can convey none. An exception, however, is recognized by *Mowry v. Walsh*, (8 Cowen's Rep. 238.) in favor of the title of subsequent *bona fide* purchasers. *id*

5. Whether this exception would be sustained, were the question now *res nova*, is doubtful. *id*

6. The doctrine of *Mowry v. Walsh* examined, and various cases in relation to it cited and reviewed. *id*

7. *Semble*, a sale procured by fraud does not divest the possession as between vendor and vendee, so as to deprive the former of his right to bring trespass, &c. *id*

8. A sheriff, who, in virtue of an execution against a fraudulent vendee of goods, and without notice of the fraud, seizes and sells them to *bona fide* purchasers, is not within the exception established by *Mowry v. Walsh*, but is liable in trespass at the suit of the vendor. *id*

9. *Quere*, whether purchasers under the sheriff would be protected, were the vendor to sue them. *id*

10. The act of *stoppage in transitu*, is, in its nature, adverse to the vendee; and the doctrine on that subject does not apply, where the vendor and vendee are agreed that the property shall be reclaimed; for it is then a question of reconveyance or rescission. *id*

11. Where one of two partners purchased goods without the privity of his copartner, and the latter, on learning the fact, proposed by letter that the vendors should have the goods again, which proposal was accepted before the goods had reached the vendees; *held*, that the sale was thereby rescinded, and the goods could not be subsequently seized in virtue of an execution against the vendees. *id*

12. A sale and delivery of goods, procured through a false representation of the vendee in regard to his solvency and credit, passes no title as between the parties; and the vendor may maintain either trover or replevin in the *detinet*, or trespass or replevin in the *cepit*, to recover their value. *Cary and another v. S. & W. Hotailing*, 311

13. So, *it seems*, of a sale to a vendee, purchasing with a preconceived design not to pay. *id*
14. Under such circumstances, the general and absolute ownership remaining in the vendor, not only the original interference with the property on the part of the vendee, but any subsequent acts of ownership by him, may be treated as an unlawful or tortious taking. *id*
15. The general owner of personal property holds the constructive possession, and may maintain trespass, though the actual possession be in another. *id*
16. A fraudulent vendee of goods may be charged in assumpsit for the price, or as a trespasser, at the election of the injured party. *id*
17. Contracts of sale, procured through fraud, are not always valid, *it seems*, even as in favor of *bona fide* purchasers. *id*
18. A sale of goods, procured through the fraud of the vendee, is equally void as between the parties, whether the fraud be in its nature indictable or not. *id*
19. Where the question is, whether a vendee of goods procured the sale of them through fraud, distinct purchases made by him or others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may reasonably be supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*. *Id. and Olmstead and others v. S. & W. Hotailing*, 317
20. Where one of two partners obtains goods by a fraudulent representation as to the solvency and credit of the firm, and afterward the firm sells the goods, replevin in the *cepit* lies against both. *Olmstead and others v. S. & W. Hotailing*, 317
21. *Semble*, that one claiming property through the fraudulent act of an agent, or partner, is affected by that act, so far as his civil rights are concerned, the same as if it were his own, even though he be morally innocent. *id*
22. Since the decision of the court for the correction of errors in *Smith & Hoe v. Acker*, (23 *Wendell*, 653,) if there is evidence that a mortgage of chattels was given for a true debt, the question of fraud as to creditors, arising from continued possession in the mortgagor, must be submitted to the jury, whether such possession be satisfactorily explained or not; and a verdict either way will conclude the parties. *Butler & Barker v. Van Wyck*, 438
23. And *semble*, the rule is the same where a like question is raised upon a bill of sale absolute on its face. *id*
24. *Quere*, whether the court of chancery is not still left to act upon the doctrine as formerly understood in reference to questions of this character. *id*
25. Bronson, J. dissented, holding that though the decision in *Smith & Hoe v. Acker*, was binding on the parties to the particular suit, it should not be followed as a precedent. *id*
26. Where a bill of sale, proved to have been given for a true debt, was assailed as fraudulent in respect to the vendor's creditors, and there was some evidence of an immediate and continued change of possession of *part* of the property embraced in it: *Held*, that the judge did right in submitting the question of fraud to the jury, and their verdict sustaining the sale could not be disturbed. *Prentiss v. Slack and another*, 467
27. Since the case of *Smith & Hoe v. Acker*, (23 *Wend.* 653,) the jury may allow almost any excuse for continuance of possession in the vendor or mortgagor, and the court have no power to set aside the verdict because of the excuse being insufficient. *Id. Fuller v. Acker*, 473
28. A. executed a memorandum under seal in February, stating that he had hired of W. a certain lot in the city of New-York, for one year from the first of May next, at \$1000 rent. He was induced to make the contract through the fraudulent representations of W. that the lot comprehended a certain other parcel of land, which, as it afterwards turned out, belonged to the corporation. A. discovered the fraud before the first of May: and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole, and occupied during the year. *Held*, in an action by W. for the rent, that A. was entitled to a deduction, by reason of the fraud, of at least what he was in good faith



obliged to pay for the corporation lease.  
*Allaire v. Whitney*, 484

9. A., immediately after the fraud, might have elected to treat the lease from W. as entirely void ; not having done so, however, but having occupied under it during the term, his only remedy was by action or *recoupment* for the damages. *id*

30. The same rule applies to purchases of personal property ; and in neither case does the party waive his right to damages by merely acting in affirmation of the contract, after discovering the fraud. *id*

31. *Semble*, that actual damage is not necessary to the maintenance of an action. A violation of right with a possibility of damage is sufficient. *id*

32. *Semble*, also, if one be led through fraud to contract that he will accept and pay for a chattel at a future period, he may maintain an action for the fraud before the period arrives, though he has paid nothing. *id*

See ACCORD AND SATISFACTION, 1.  
EVIDENCE, 27, 31, 32, 33.  
FRAUDULENT CONVEYANCES, 1, 2.  
LARCENY, 6, 7.  
LIEN, 1.  
NEW TRIAL, 1 to 7.

## FRAUDS, STATUTE OF.

See ASSUMPSIT, 1, 16.

## FRAUDULENT CONVEYANCES.

- Where one took a deed of another's farm, to defraud the grantor's creditors, and afterwards, in pursuance of the same fraudulent arrangement, procured an assignment of an outstanding valid mortgage on the farm, with the grantor's money ; *held*, in ejectment by one deriving title under a judgment and execution against the grantor, that neither the deed nor assignment were available as a defence. *Stephens v. Sinclair*, 143
- By an assignment procured under such circumstances, the *grantor* is constituted the *real assignee*, and the whole enures to the benefit of his creditors, who may seize and sell the land discharged of the mortgage. *id*

See DEED, 10.  
FRAUD, 22 to 27.

## FRIVOLOUS PLEA OR NOTICE

See PRACTICE, 34, 35, 54 to 56, 63 to 65

## GENERAL BANK-LAW.

See BANKS, 1.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 3 to 5.  
EVIDENCE, 2.

## GOODS SOLD AND DELIVERED

See FRAUD, 1 to 27, 30 to 32.  
TENANTS IN COMMON, 1, 2, 7.  
TORT, WAIVER OF.  
WEIGHTS AND MEASURES.

## GUARDIAN.

See BAIL, 2  
JURISDICTION, 2, 6.  
SURROGATE, 8 to 10.

## GUARANTY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 9, 15, 16, 42.

## H

## HABEAS CORPUS.

- In a proceeding to compel an attorney of this court to pay over moneys collected for his client, a rule was entered which recited the filing of interrogatories, together with the fact of the defendant having answered ; and then, after referring it to the clerk forthwith to ascertain and report the costs, &c , and the amount directed by a previous order in the same matter to be paid by the defendant, went on to fine him in the amount so to be reported, and ordered that he be committed to the custody of the sheriff, until that sum, as well as the costs and expenses of the commitment, were paid : *Held*, that the report having been filed the next day, a certified copy thereof, and of the



said rule, were sufficient to authorize the sheriff to arrest and imprison the defendant: and a discharge from the imprisonment, granted by a supreme court commissioner, was reversed. *The People, ex rel. Johnson, v. Nevins*, 154

2. *Semble*, had there been in this case no actual entry of the proceedings prior to the defendant's arrest, the imprisonment would have been lawful, and the entry might have been made afterwards. *id*

3. A sheriff's return of commitment, to a writ of *habeas corpus*, should be construed liberally. *id*

4. One duly committed upon a regular indictment for murder, cannot be discharged upon *habeas corpus*, by proving his innocence merely, however clear the proof may be; but must abide a trial by jury. *The People v. Alexander McLeod*, 377

5 The protection of the English *habeas corpus* act (31 Car. 2, c. 2) against unlawful imprisonment, went no farther than the enlargement of the prisoner on bail, if the offence were bailable. *id*

6 The provision in the revised statutes, (2 R. S. 471, § 50, 2d ed.) allowing a party on *habeas corpus* to deny the truth of the return, and allege matters showing that he is entitled to be discharged, &c. was not intended to give him the right of summary trial as to the question of guilt or innocence; but merely to enable him, by evidence *aliunde* the return, to dispute the fact of his being detained on the process or proceeding set forth, or to impeach it for lack of jurisdiction, or, *semble*, to show that by some subsequent event, (e. g. a pardon, reversal of judgment, &c.) it has ceased to be lawful cause of detention. *id*

7. Mere evidence of innocence, cannot be used on *habeas corpus* as an argument for letting the prisoner to bail, if the application is *after indictment* found. *Id. And see Notes (a) (b) (c).*

8. And even where the application to bail is before indictment, the right of enquiry as to guilt or innocence is limited to the depositions or proofs on which the commitment was ordered. *id*

9. *Semble*, that under the statute 31 Car. 2, c. 2, where the warrant of arrest or

commitment contained a specific charge of an offence not bailable, the prisoner on *habeas corpus* was not entitled to any relief whatever. *Id. And see note (c).*

10. Several English cases on *habeas corpus* to admit to bail, reviewed and commented on. *id*

## HAND-WRITING.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 28.

**DEPOSITION**, 8.

**PRINCIPAL AND SURETY**, 6.

## HIGHWAYS.

See **CERTIORARI**, 7 to 9.  
**STREETS**.

## HOMICIDE.

See **CRIMES**.

**HABEAS CORPUS**, 4 to 10.

**WAR AND PEACE**, 6 to 8

## HUSBAND AND WIFE.

See **DEED**, 4, 5, 9, 10.

**EVIDENCE**, 44.

**MARRIAGE**.

**PRINCIPAL AND AGENT**, 4

**WITNESS**, 1 to 4.

## I

## IDIOTS AND LUNATICS.

1. An action for money had and received to the use of a lunatic, cannot be maintained in the name of his committee. *Lane & Gross, committee, &c. v. Schermerhorn*, 97

2. Nor can ejectment be maintained in the name of the committee, on the title of the lunatic. *id*

3. There is no difference, in this respect, between actions relating to the real estate of the lunatic, and those relating to his personal estate. *id*

4. *It seems*, that the rule as to parties

where a claim of this nature is prosecuted, is the same at law and in equity. *id*

See PRINCIPAL AND AGENT, 4.

### IMPRISONMENT.

1. Where the first two counts of a declaration were in *assumpsit*, the third in *case*, charging negligence of the defendants as warehouse-men in not safely keeping, &c. goods, and the fourth in *trover* for the goods; and the plaintiff, having obtained a general verdict of guilty upon proof of the defendants' negligence as alleged, entered up judgment, and issued a *ca. sa.*, on which one of the defendants was arrested: *Held*, that the imprisonment was unlawful, and the defendant arrested entitled to be discharged. *Brown v. Treat & Carter*, 225

2. *Semble*, that the non-imprisonment act prohibits an arrest, &c. in all suits founded in a credit given by the plaintiff to the defendant, except such as are mentioned in the second section; and that the form of the remedy chosen by the plaintiff, as whether *case*, *trover*, or otherwise, will not be allowed to affect the defendant's rights in this respect. *id*

See CONTEMPT.  
HABEAS CORPUS.

### INDEMNITY.

See DEBT.  
OFFICER, 2.  
PLEADING, 13 to 15.  
PRINCIPAL AND SURETY.

### INDIANS.

See DEED, 5.

### INDICTMENT.

See CRIME.  
HABEAS CORPUS, 4 to 10.  
LARCENY, 3, 4, 6, 7.  
NOLLE PROSEQUI.  
OFFICER, 1.  
PRACTICE, 3 to 6.  
RAPE.  
SUPERVISORS, 7.  
WAR AND PEACE.

### INDORSER AND INDORSEE.

See ASSUMPSIT, 10 to 13.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 5, 6, 8 to 10, 15, 16, 19 to 33, 36, 44 to 46.  
JUDGMENTS AND EXECUTIONS, 7, 8

### INFANT.

See BAIL, 2.  
DEED, 3, 5.  
JURISDICTION, 2, 6.  
OFFICER, 15.  
PRINCIPAL AND AGENT, 4.  
RAPE.  
SURROGATE, 8 to 10

### INFANT'S ESTATE.

See SURROGATE, 8 to 10.

### INFERIOR COURT.

See CONTEMPT, 9, 10, 12.  
COURT OF A JUSTICE OF THE PEACE.  
COURT OF SPECIAL SESSIONS.  
JURISDICTION.  
LANDLORD AND TENANT.  
PLEADING, 10.  
SURROGATE.

### INJUNCTION TO STAY PROCEEDINGS AT LAW.

See PRACTICE, 51 to 53.

### INNOCENCE.

See EVIDENCE, 26, 27.  
HABEAS CORPUS, 4 to 8.  
MARRIAGE, 5.  
WAR AND PEACE, 8.

### INQUEST

1. Where, in replevin, the cause was reached at the circuit in its regular order on the calendar, and the defendant refused to appear; whereupon the plaintiff entered his default, and the cause proceeded, both parties treating it as an inquest: *Held*, on bill of exceptions for the exclusion of evidence proposed by the defendant, that he

could not be allowed to change his ground, and claim rights beyond what are incident to an inquest. *Kerker & Willets v. Carter*, 101

2. On an inquest at the circuit, the defendant may examine the plaintiff's witnesses to controvert the evidence given to sustain the action; but he cannot, under color of exercising this right, show a substantive defence *aliunde*. *id*

3. The rule on this point laid down in *Hartness v. Boyd*, (5 Wendell, 563,) approved, and the previous case of *Green ads. Willis*, (1 Wend. 78,) regarded as overruled. *id*

See PRACTICE, 43 to 45, 62.

### INSOLVENT.

1. The insolvent act of 1811 was not wholly void, but only so as to a part of the creditors designed to be affected by it; and if a discharge under it was valid, when made, as against any of the insolvent's creditors, it does not lie with him to allege, as against a title derived through the assignment, that the latter was inoperative. *Gillet and others v. Stanley*, 121

2. The officer conducting insolvent proceedings under that act, had power to appoint a new assignee, as well *after* the assignment was executed as *before*, provided a vacancy existed arising from one of the causes specified in the second section. *id*

See DEED, 8.

EJECTMENT, 4, 5.

PROMISE, 2 to 6

### INSURANCE.

1. Where a policy upon the cargo of a vessel, insured in express terms, among other things, against "*thieves, &c. barratry of the master and mariners*," &c.: *Held*, that a loss by theft, whether the offence was committed by the crew or others, was covered by the policy. *The American Insurance Company of New-York v. Bryan & Maitland*, 25

2. The term "*thieves*," in such a policy, is not limited in its application to *external* or *assailing* thieves merely, but

extends to thefts from within, by *mariners*, passengers, &c. *id*

3. An act incorporating an insurance company, declares, that its policies, executed in a given mode, shall have the like force and effect as if under the seal of the corporation; and that *covenant* or *case* may be brought thereon: *semble*, that in a suit on such a policy, should the plaintiff declare expressly in covenant, in one count, and then add another, so constructed as to leave it uncertain whether it is in *case* or *covenant*, the defendant may treat it as the former, and demur for misjoinder of counts. *Ferris & Eaton v. The North American Fire Insurance Company*, 71

4. Otherwise, however, where the declaration commences with the usual introductory words, "in a plea of a breach of covenant;" for they apply to the whole declaration *id*

5. A condition of a policy declaring, that *all fraud or false swearing shall cause a forfeiture of claims on the insurer*, &c. relates solely to the preliminary proofs of loss; and in an action on the policy, a plea setting up fraud, &c. without showing that it was committed in the rendition of the preliminary proofs, is bad. *id*

6. *A fortiori* is such plea bad, if it do not show that the fraud &c. was committed by the insured or some party in interest. *id*

7. The defendants' act of incorporation provided for an assignment of the subject matter insured, as well as the policy; and that notice being given to the company before loss, the assignee should have all the benefit of the policy, and might sue in his own name. *E. & F.* being insured, the former executed to the latter, with the company's consent, and before loss, an assignment of all interest in the subject insured, as well as in the policy; and after loss, an action was brought on the policy in their joint names: *Held*, that a count in the declaration, alleging such assignment, was bad, as showing that the plaintiffs could not sue jointly: and a plea *in bar*, setting up the same facts in answer to another count, was adjudged good. *id*

8. For the purposes of this suit, the plea was in effect the same as a plea that *both* plaintiffs had assigned. *id*

- 9 Whether the matter might be pleaded in *abatement*, *quere.* *id*

- 11 Where a policy issued by a mutual fire insurance company contained this clause: "The interest of the assured in this policy is not assignable without the consent of said company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect:" *Held*, that an assignment of the *policy* without the consent provided for, was equally fatal to the claims of the assured as an assignment or sale of the *subject* of insurance. *Smith v. The Saratoga Mutual Fire Ins. Co.* 497

11. A clause of this nature does not nullify the *assignment* merely, but operates upon the policy. *id*

12. A policy of insurance against fire is, in its nature, assignable, so as to pass an equitable interest to the assignee *id*

13. Where the insured, on applying for insurance upon a building against fire, promised the insurers verbally that if they would grant his application he would discontinue the use of a *fire-place* in the basement and use a stove instead thereof; but, after obtaining the policy, persisted in using the fire-place as before: *Held*, that this avoided the policy. *Alston v. The Mechanics' Mutual Fire Ins. Co., &c.* 510

14. A *representation*, within the meaning of that term as applied to policies of insurance, may, like a *warranty*, be either *affirmative* in its character, or *promissory*. *id*

15. A *warranty*, being matter contained in the policy, is fatal to it, if violated only in the *letter*. Otherwise, as to a representation; for this being matter *aliunde*, requires only a *substantial* compliance. *id*

16. A representation, whether promissory or affirmative in its nature, must relate to something material to the risk. *id*

## INTENT.

See EVIDENCE, 1, 31.

RAPE.

USURY, 3 to 6.

WAR AND PEACE, 8.

## INTEREST.

See USURY.

## INTEREST OF WITNESS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 26.

WITNESS, 5 to 12.

## INTERNATIONAL LAW

See CRIMES, 5, 6, 7.

WAR AND PEACE.

## INTERROGATORIES.

See DEPOSITION, 11, 13.

## INVASION.

See CRIMES.

WAR AND PEACE.

## INVENTORY AND ACCOUNT.

See SURROGATE, 2 to 5.

## J

## JOINT WRONG-DOERS OR CONTRACTORS.

See RELEASE.

WITNESS, 7 to 9.

## JUDGE'S CHARGE.

See BILL OF EXCEPTIONS, 1

EVIDENCE, 15.

NEW TRIAL, 1, 4 to 7

## JUDGMENTS AND EXECUTIONS.

- 1 Where assignees of personal estate in trust for creditors requested A. to purchase a judgment against their assignor, then a subsisting lien on his real estate, whereupon A. accordingly did so, giving his own notes for the judgment and taking an assignment of it directly to himself; *Held*, no ex

- tinguishment of the lien, though the purchase was intended for the assignees' benefit, and they subsequently paid A.'s notes out of the trust funds. *Steele v. Babcock*, 527
- 2 The result would have been the same had the assignees purchased the judgment without the intervention of A., it not appearing that a satisfaction was intended; and this, *semble*, as well in equity as at law. *id*
3. In equity, if trustees, by an unauthorized use of the trust funds, purchase a judgment, the *cestui que trust* may elect either to stand as the equitable owner of it, or to consider the purchase a wrong, and call the trustees to account for the funds thus misapplied; in which latter case the judgment will be regarded as belonging to the assignees in their own right. *Semble. id*
4. A vendee of lands, having obtained his deed, was subsequently notified of an outstanding lien by judgment against the vendor, whereupon the vendee promised the creditor to retain a portion of the purchase money for his benefit, which the vendee did not do, but, under a belief that the vendor was in good circumstances, paid it to him. The creditor suffered the judgment to lie ten years after it was docketed, and then sued out execution, on which the lands so purchased were seized. *Held*, that the vendee's right being clear, he was entitled to summary relief, by an order for a perpetual stay of proceedings; though, *semble*, had there been doubt of his good faith, either in respect to the original purchase, or the non-fulfilment of his promise as to retaining the purchase money, the court would have allowed the creditor to sell. *Davis v. S. Tiffany*, 642
5. The case of *Hewson v. Dygert*, (8 *John. Rep.* 333,) so far as it imports an unqualified denial of the vendee's claim to summary relief, under these and similar circumstances, is overruled. *id*
- 6 The plaintiff may bring an action on a judgment, though time enough has not elapsed since it was entered to entitle him to a *fi. fa.* thereon, pursuant to the act of May 14th, 1840. *Church v. Cole and others*, 645
- 7 Where a judgment was recovered and execution issued against the maker and several endorsers of a note, among whom was R., a mere accommodation endorser, who paid the judgment; *held*, that the court had no power to permit R. to sue out execution against the parties to the judgment who stood prior to him on the note. *Ontario Bank v. Walker and others*, 652
8. A surety who pays a judgment recovered against him and his principal, is entitled, *in equity*, to be subrogated to the creditor's means of enforcing collection; but, *at law*, the payment extinguishes the judgment, and the surety's only remedy is by a suit and recovery over. *id*
9. A mere *rule* in arrest of judgment leaves the action still pending and pleadable as such to a new suit, until judgment thereon has been entered of record. *Lusk v. Hastings*, 656
- See ABATEMENT, 1 to 3.  
 ASSUMPSIT, 12, 14.  
 ATTORNEY AND COUNSEL, 4, 5.  
 COSTS, 1, 2.  
 COURT OF A JUSTICE OF THE PEACE, 10.  
 DAMAGES, 3, 4.  
 DEBTORS, ABSCONDING, CONCEALED &c. 3, 4.  
 FRAUD, 1 to 11, 22 to 27.  
 JURISDICTION.  
 LEVY.  
 MORTGAGE OF LANDS, 5.  
 OFFICER, 8 to 12.  
 PARTNERSHIP, 9.  
 PRACTICE, 28, 36, 37, 43, 62  
 REDEMPTION.  
 SET-OFF.  
 SCIRE FACIAS.
- JUDGMENT AS IN CASE OF NONSUIT.
- See PRACTICE, 28 to 30.
- JUDGMENT OF ANOTHER STATE.
- See DEBTORS, ABSCONDING, CONCEALED &c. 3, 4.  
 PLEADING, 26 to 28.
- JUDICIAL NOTICE.
- See ATTORNEY AND COUNSEL, 9  
 DEPOSITION, 8  
 EVIDENCE, 2

# JURISDICTION

1. *Semble*, that the usual presumption in favor of the performance of official duty, is to have little weight in making out an essential jurisdictional fact. *Bloom and others v. Burdick*, 130
- 2 No one can be condemned, or divested of his rights, until he has had an opportunity, in some form, of being heard; as by serving process, publishing notice, appointing a guardian, &c. And if judgment be rendered against him before that is done, the proceeding will be utterly void. *id*
3. Where a statute prescribes the mode of acquiring jurisdiction over the person, that mode must be complied with, or the proceeding will be a nullity. *id*
- 4 The consequences of an ascertained jurisdictional defect, in avoiding the proceedings, is the same, whether the court be of superior or inferior jurisdiction. The distinction lies in the mode of reaching the defect. In regard to superior courts, their jurisdiction is presumed till the contrary appears; whereas the jurisdiction of inferior courts is never presumed, but must be proved. *id*
- 5 The case of *Denning v. Corwin*, (11 *Wendell*, 647,) so far as it asserts that the judgment of a superior court will be void, if the record do not show jurisdiction expressly, has been overruled. *id*
6. Where the proceedings are at common law, and an infant appears by attorney instead of guardian, or, after service of process suffers a default, the judgment will be *erroneous* merely—not void. *id*
7. *Semble*, that even on *certiorari* to remove a summary conviction by an inferior court, the superior court will intend the proper notice to acquire jurisdiction. *The People ex rel. Johnson, v. Nevins*, 154
8. Where the proceedings of a superior court are drawn in question collaterally, before an inferior, the latter has no power to examine the *regularity* of the jurisdictional steps. *id*
9. *Quere*, whether the judgment of a domestic court of general jurisdiction can

be impeached collaterally, by shewing want of notice to the defendant; the record importing full jurisdiction? *Butler v. The Mayor, &c. of New-York*, 489

See ARBITRATION AND AWARD, 8, 11, 17, 23 to 30.

ATTORNEY AND COUNSEL, 1.

BAIL IN CIVIL CASES, 3 to 6.

CANAL COMMISSIONERS, 1 to 9.

CERTIORARI.

CONTEMPT, 2 to 5, 7 to 12.

COURT OF A JUSTICE OF THE PEACE, 10.

COURT OF SPECIAL SESSIONS.

CRIMES, 1, 5 to 8

HABEAS CORPUS.

INSOLVENT, 2.

LANDLORD AND TENANT.

OFFICER, 2 to 7.

PLEADING, 26 to 29.

POWER, 4.

STATUTES, 3.

SUPERVISORS, 4, 8 to 12.

SURROGATE, 1 to 10.

WAR AND PEACE.

## JURY.

1. Where jurors during the trial of a civil cause were allowed to separate, and one of them drank spirituous liquors: *held*, not a ground for setting aside the verdict, it not appearing that in so doing he violated any express direction of the court, and there being no reason to suppose that he drank to excess, or upon the invitation or at the expense of either of the parties. *Wilson v. Abrahams*, 207
2. The case of *Brant v. Fowler* (7 *Cowen's R.* 262,) so far as it holds the mere fact of drinking spirituous liquors by a juror, during the progress of a trial, to be sufficient, *per se*, to warrant the setting aside of the verdict, cannot be supported. *id*
3. Every irregularity of a juror which would subject him to censure, whether in drinking spirituous liquors, separating from his fellows or the like, should not overturn the verdict, unless there be some reason to suspect that the irregularity may have had an influence on the final result of the cause. *id*
4. Cases relating to the misconduct of jurors in *civil* and *criminal* trials cited and reviewed *id*

5. The sheriff's wife being sister to the wife of the plaintiff, constitutes cause of principal challenge to the array. *Foot v. Morgan*, 654

6. Such relationship between the plaintiff and a juror, constitutes a ground of challenge for affinity. *id*

See CONSTITUTION, 1, 2.

COURT OF A JUSTICE OF THE PEACE,  
3, 5, 6.

COURT OF SPECIAL SESSIONS, 2 to 6.

### JUSTICE'S COURT.

See COURT OF A JUSTICE OF THE PEACE.

### JUSTICE OF THE PEACE.

A person sworn as a witness before a justice of the peace, though entitled as against the party calling him, to fees for attendance, cannot maintain an action therefor against the justice. *Watts v. Van Ness*, 76

See COURT OF A JUSTICE OF THE PEACE.  
SPECIAL SESSIONS.

## L

### LANDLORD AND TENANT.

Where, in summary proceedings instituted by a landlord to remove his tenant, the summons was served by copy, and the proof of service was simply that the tenant *was absent*, and that the copy was left *with R. residing on the premises*; HELD, insufficient, as not showing the tenant's absence from "his last or usual place of residence," or that the copy was left with a "person of mature age." *Cameron v. McDonald*, 512

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 49, 50.

COSTS, 8 to 12.

DAMAGES, 1, 2.

TREES.

WID, 28, 29.

WANTS IN COMMON, 1 to 4, 9 to 11.

WITNESS, 5, 6.

### LARCENY.

e property, (e. g. a pocket-book containing bank bills,) with no mark

about it indicating the owner, was lost, and found in the highway, and there was no evidence to show that the finder, at the time, knew who the owner was; HELD, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterward. *The People v. Cogdell*, 94

2. To render the finder of lost property liable as for a larceny, he must know who the owner is, at the time he acquires possession, or have the means of identifying him *instantly*, by marks then about the property which the finder understands. It is not enough that he has general means of discovering the owner, by honest diligence, &c. *id*

3. An indictment for petit larceny, charging it as a second offence, is good, though in respect to the first offence, it merely alleges that the defendant *was convicted*, &c., without averring in terms a judgment or sentence, and though it does not specify the property to which the first offence related, or the person from whom it was stolen. *Stevens v. The People*, 261

4. Otherwise, however, if the indictment omits to aver, that the defendant had been *pardoned*, or otherwise discharged from the first conviction, before the commission of the second offence. *id*

5. It is no objection to the validity of a record of conviction by the general sessions, that the judge who signed it was not such when the conviction took place, but received his appointment afterwards. *id*

6. One who obtains the bailment of goods, fraudulently intending to deprive the owner of his property, may be convicted of larceny, under an indictment alleging that he feloniously stole, took and carried away the property. &c. *Cary and another v. S. & W. Hotelling*, 311

7. But if the transaction is made to assume the form of a sale, unless it comes within the statute as to false pretences, the fraudulent vendee is shielded from the charge of taking, in a criminal sense, though it is otherwise in respect to the civil remedy. *id*

See INSURANCE, 1, 2

**LAW.**

*See* COMMON LAW.  
MARRIAGE, 2.

**LEADING QUESTION.**

*See* DEPOSITION, 11, 13.  
EVIDENCE, 25, 31.  
USURY, 6.

**LEASE.**

A demise for a term commencing in fu-  
ture, passes a present interest in the  
term to the lessee. *Allaire v. Whit-*  
*ney,* 484

*See* DAMAGES, 1, 2.  
DISTRESS.  
FRAUD, 28, 29.  
LANDLORD AND TENANT.  
TENANTS IN COMMON, 1 to 4, 9 to 11.  
WITNESS, 5, 6.

**LEGAL JUDGMENT.**

*See* COURT OF ERRORS, 1.

**LEGATEE, RESIDUARY.**

*See* WILL, 6, 7.

**LEGISLATIVE POWER.**

*See* CONSTITUTION.  
STATUTES.

**LEGITIMACY.**

*See* MARRIAGE.

**LESSOR AND LESSEE.**

*See* COVENANT, 1, 2.  
FRAUD, 28, 29.  
TENANTS IN COMMON.  
WITNESS, 5, 6.

**LEVY.**

Where a sheriff has seized property under  
a *fi. fa.*, and then another *fi. fa.* against

the same defendant comes to his hands,  
the bare receiving of the latter operates  
as a constructive levy under it on the  
property seized upon the first. *Van*  
*Winkle v. Udall,* 559

*See* OFFICER, 2 to 12  
SHERIFF.

**LICENSE.**

*See* EXCISE.

**LIEN.**

1. In an action under the New-York city  
*lien law*, (*Sess. Laws of 1830, p. 412,*  
*and Sess. Laws of 1832, p. 181.*)  
brought to charge the owner of a build-  
ing for labor and materials furnished  
the contractor; *quere*, whether it can  
be made a ground of recovery, that the  
contract, so far as a certain note of a  
third person, therein agreed to be taken  
as part payment, is concerned, was  
originally entered into, and the note de-  
livered, in fraud of the *material men*.  
*Rudd and another v. Davis,* 277
2. Upon service of the attested account,  
the owner becomes liable for any bal-  
ance due from him to the contractor at  
that time, or accruing afterward; and  
the claimant is regarded as an assignee,  
*pro tanto*, of the contractor's demand.  
*id*
3. After the plaintiff in such action  
has proved his account, and a substan-  
tial performance of the contractor's  
agreement with the owner, this is *pri-*  
*ma facie* sufficient to show moneys due  
the contractor, out of which the plain-  
tiff is entitled to be paid; and if the  
fact is otherwise, the *onus* of proving it  
is on the defendant. *id*
4. The case of *Hawell v. Goodchild*, (12  
*Wendell, 373,*) commented on and ex-  
plained. *id*

*See* COSTS, 4, 5.  
JUDGMENTS AND EXECUTION, 1 to 5,  
7, 8.  
MORTGAGE OF LANDS.  
REDEMPTION.

**LIMITATION, STATUTE OF**

*See* AMENDMENT, 2, 3.  
PLEADING, 23, 24, 30.  
PRACTICE, 64, 65.



## LOAN.

See ARBITRATION AND AWARD, 1 to 4.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 8 to 10, 42, 51, 52.  
MONEY LENT.  
USURY.

## LOSS OF WRITTEN INSTRUMENT.

See EVIDENCE, 20 to 23.

## LOST PROPERTY.

See LARCENY, 1, 2.

## LUNATICS.

See IDIOTS, LUNATICS, &c.

## M

## MAIL, PAPERS SENT BY.

See ASSUMPTIT, 10 to 13.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 19 to 24.  
PRACTICE, 25 to 27.

## MANDAMUS.

1. As a general rule, the peremptory writ of mandamus must pursue the alternative one, in respect to the thing required to be done. *The People, ex rel. The Commissioners of Highways of Poughkeepsie and Fishkill, v. The Board of Supervisors of the County of Dutchess,* 50
- 2 *Semble*, that persons upon whom a tax has been illegally imposed, and which is about to be collected, can obtain no relief through a mandamus. *The People, ex rel. Onderdonk, v. The Supervisors of Queens County,* 195

See CORPORATION, 4.  
EXCISE.  
MEDICAL SOCIETY.  
SUPERVISORS, 5 to 7, 14.

## MARRIAGE.

1. On a question as to the legitimacy of A., it appeared that her parents had

been intimate in the way of courtship for nearly a year before her birth—that they intended to be married—that her father, being a sea-faring man, left on a voyage, and was accidentally detained longer than he expected—that A. was born a few days before his return—that within a week or so after, the parents were publicly married by a clergyman—that they subsequently cohabited as husband and wife for many years, and until their separation by death, always treating A. as their legitimate child; *Held*, sufficient to warrant a jury in finding that a marriage in fact existed previous to A.'s birth, notwithstanding the ceremony which took place afterward. *Starr and others v. Peck,* 270

2. In the absence of proof as to what was the law of Connecticut respecting marriage, the court presumed that the common law prevailed there. *id*
3. At common law, no formal ceremony is requisite to give validity to a marriage; but a contract between the parties *per verba de presenti* is enough. *id*
4. So, *semble*, of such a contract, in certain cases, though *executory* in form, if followed by cohabitation; for the acts of the parties may be taken as giving a construction to their words, and rendering them presently operative. *id*
5. Cohabitation between a male and female is to be presumed innocent and lawful, unless there are circumstances marking the case as one of prostitution. *id*

See DEED, 4, 5, 9, 10.  
EVIDENCE, 44.  
PRACTICE, 8, 39, 40.  
PRINCIPAL AND AGENT, 4.

## MASTER AND OWNER.

See STRAMBOATE.

## MEASURES.

See WEIGHTS AND MEASURES

## MECHANIC'S LIEN.

See LIEN.

**MEDICAL SOCIETY.**

This court will not grant a mandamus to compel a county medical society to admit one as a member, where it clearly appears that if admitted he would be immediately liable to expulsion for gross ignorance or misconduct. *Ex parte Paine*, 665

**MEMORANDUM.**

See EVIDENCE, 25.

**MERGER.**

See ASSUMPSIT, 8.  
 BAR BY FORMER SUIT OR AWARD.  
 DEBTORS, ABSCONDING, CONCEALED, &c. 4.  
 MORTGAGE OF LANDS, 1 to 3.  
 RELEASE, 1 to 4.

**MERITS, AFFIDAVIT OF.**

See PRACTICE, 16 to 23, 31, 35, 36 46 to 48.

**MISDEMEANOR.**

See OFFICER, 1.

**MISJOINDER OF COUNTS.**

See COURT OF A JUSTICE OF THE PEACE, 2.  
 INSURANCE, 3, 4.  
 PLEADING, 5, 22.

**MISJOINDER OF PARTIES.**

See INSURANCE, 7 to 9.  
 PLEADING, 7.

**MISTAKE.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 29, 32.  
 EVIDENCE, 32, 33, 49.

**MONEY HAD AND RECEIVED.**

See ASSUMPSIT, 4, 5, 10.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 25 to 32.

**MONEY LENT.**

The defendant having taken out criminal process, put it into the plaintiff's hands, who was a constable at Utica, with directions to proceed to Buffalo and serve it, which the plaintiff did; but before starting, he asked the defendant for money, saying he had not enough to go with; whereupon the defendant let him have \$30: *Held*, that this must be regarded as money lent, notwithstanding a declaration of the defendant afterward, that it had cost him \$40 or \$50 for constable's fees; especially, as the plaintiff had presented his claim for the services to the board of supervisors, and obtained the proper allowance. *Parker v. Newland*, 87

See ACTION, 1.

ARBITRATION AND AWARD, 1 to 4.

**MONEY PAID, &c.**

See ASSUMPSIT, 7.

**MORAL OBLIGATION.**

See PROMISE.

**MORTGAGE OF CHATTELS**

1. After default in payment of a chattel mortgage, the mortgagee's title to the property becomes absolute at law, and he is entitled to the possession immediately. Hence, he may maintain replevin in the *cepit* against one who tortiously takes it from the mortgagor. *Fuller v. Acker*, 473
2. Nor can it vary the case though, subsequent to the default, the mortgagee filed a copy of the mortgage and a statement, pursuant to the act of April 29th, 1833; for that will not operate an extension of credit, or give the mortgagor any additional right of possession. *id*

See COSTS, 4, 5.

FIXTURES, 1 to 4.

FRAUD, 22 to 27.

EVIDENCE, 32, 33.

## MORTGAGE OF LANDS.

1. Where the assignee of a mortgage takes a quit-claim deed of one *half* of the mortgaged premises, this does not extinguish the mortgage. At most, it can only operate an extinguishment of a *part* of the mortgage debt, leaving the assignee at liberty to foreclose for the residue. *Klock v. Cronkhite*, 107
2. It will make no difference in such case, that the assignee's title to such half is derived from one who had purchased it of the mortgagor, and gave back an agreement to pay off the mortgage; especially if the assignee had no notice of the agreement. And *semble*, even were he notified, the result would be the same. *id*
3. *Quere*, whether, if the assignee's deed, instead of being for *half*, had covered the *whole* premises, it could have operated an extinguishment of the mortgage. *id*
4. Where one, in a mortgage foreclosure under the statute, through an honest mistake of his legal rights, claims in his notice more than is due him, this will not affect the validity of the sale. And *quere*, whether such erroneous claim could, under any circumstances, prevent the purchaser from acquiring a good title. *id*
5. E. having a judgment, obtained in 1832, which was a lien on premises covered by a prior mortgage dated in 1829, caused the same to be levied on and sold, and bid them in himself. After the sale became absolute, he obtained the sheriff's deed, and the mortgage was foreclosed under the statute. *Held*, that E. acquired no title under the judgment, and of course could convey none to the defendant, his grantee. *id*

See ASSUMPSIT, 7 to 9, 14.  
 DRED, 9 to 11.  
 EVIDENCE, 44, 48, 49.  
 FRAUDULENT CONVEYANCES, 1, 2.

## MURDER.

See CRIMES.  
 HABEAS CORPUS, 4 to 10.  
 WAR AND PEACE, 6 to 8.

## N

## NATIONAL LAW.

See CRIMES.  
 WAR AND PEACE.

## NE RECIPIATUR.

See PRACTICE, 28 to 30.

## NEIGHBORING STATE, ACTS, RECORDS, &amp;c.

See BAIL IN CIVIL CASES, 3 to 6.  
 DEBTORS, ABSCONDING, CONCEALED, &c. 3, 4.  
 MARRIAGE, 2.  
 PLEADING, 26 to 29.

## NEW TRIAL.

1. Where a plaintiff requested the judge to charge in respect to the defence of usury, that it must be proved *beyond a reasonable doubt*, or the jury must find against it; and he refused so to charge, telling the jury that it was enough *if they were satisfied usury was made out*: *Held*, that this being nothing more than denying one proposition and affirming another identical with it, afforded no ground for ordering a new trial. *Aeby v. Rapelye and others*, 9
2. A motion for a new trial, *on a case*, will be denied, *it seems*, irrespective of the ground on which the cause was disposed of at the circuit, if the court see that another exists which *must* ultimately prove fatal to the party moving; otherwise, where the question arises on *bill of exceptions*. *Horton v. Hendershot*, 118
3. A new trial will not be granted because it appears by the bill of exceptions that the circuit judge, in pronouncing a *correct decision*, gave an *erroneous reason* for it. *Curtis v. Hubbard*, 336
4. A judge may lawfully refuse to modify his charge to the jury, where the modification requested would not vary the *legal effect* of the charge, but only its *phraseology*. *Hanford v. Artcher*, 347

5. Accordingly, on a question of fraud as to creditors arising under 2 R. S. 70, § 5, 2d ed., where it appeared that the debtor had assigned the property in question ostensibly in trust for creditors, that the plaintiff purchased it of the assignees, and then entrusted it to the debtor to sell, but the property had never been removed from where the debtor kept it when he assigned: *Held*, that after the judge had read the statute to the jury, and told them, the question of fraudulent intent was one of fact for their decision, he was not bound, on the request of counsel, to charge afterward, *that if they believed the sale was made in good faith, and without any intent to defraud creditors, it was valid.* *id*

6. And the judge having charged the jury to inquire, whether the assignment had been accompanied by an immediate delivery, and followed by an actual and continued change of possession: and that if so, their verdict should be for the plaintiff: *Held*, he was not bound, though requested to charge afterward, *that if the plaintiff when he purchased, actually and bona fide employed the debtor as his agent to sell, &c., it would not render the sale void; for this was included in the charge given.* *id*

7. Where a charge is requested in favor of a given proposition, which the judge cannot legally sanction without connecting other matters with it, he may overrule the request absolutely. Accordingly, he having been called on in this case to charge, *that if the assignees took and retained possession till the plaintiff's purchase, his employing the debtor as his agent did not render the sale void: Held*, that as the correctness of the proposition depended on the particular nature and object of the employment, the decision of the judge overruling it was proper. *id*

8. Even though a new trial is moved for upon a case, the grounds assumed on the argument should, in general, appear to have been distinctly mentioned to the judge at the trial. *Stafford v. Bacon*, 532

See BILL OF EXCEPTIONS, 1 to 4.  
DEMURRER TO EVIDENCE, 7.  
EVIDENCE, 37.  
FRAUD, 22 to 27.  
JURY, 1 to 4.  
PRACTICE, 1, 2.

## NEW-YORK, CITY OF.

See LIEN.  
OFFICER, 13, 14.  
STREETS, 1 to 8.

## NOLLE PROSEQUI.

1. The court has no power to order the entry of a *nolle prosequi* upon an indictment. *The People v. Alexander McLeod*, 377
2. This power, at common law, could only be exercised by the *attorney general*, and, *it seems*, we have no statute depriving him of it. *id*
3. But a *district attorney* cannot enter a *nolle prosequi*, without leave from the proper court. *id*

## NON-IMPRISONMENT ACT

See IMPRISONMENT.

## NON-JOINDER.

See ABATEMENT, 1 to 5.  
TENANTS IN COMMON, 6.

## NONSUIT, JUDGMENT AS IN CASE OF.

See PRACTICE, 28 to 30.

## NOTARY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 19 to 24.

## NOTICE.

See ARBITRATION AND AWARD, 17, 28.  
ASSUMPSIT, 11.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 19 to 25, 30, 31.  
DEED, 9, 10, 11.  
EVIDENCE, 44.  
JURISDICTION.  
LANDLORD AND TENANT.  
PARTNERSHIP, 6 to 9.  
PLEADING, 26 to 29.  
PRACTICE, 12, 20, 21, 24, 31, 34, 38, 54 to 56

See SCIRE FACIAS, 6  
STREET, 6, 7.  
SURROGATE, 7 to 10.

## NOTICE OF SPECIAL MATTER.

See PRACTICE, 54 to 56.

## O

### OATH.

See ARBITRATION AND AWARD, 9.  
DEPOSITION, 7.

### OBJECTIONS TO EVIDENCE.

See ATTORNEY AND COUNSEL, 3.  
DEPOSITION, 10, 11, 13.  
EVIDENCE, 24

### OFFICER.

1. A constable taking fees beyond the amount allowed by law, is indictable as for a misdemeanor. *Parker v. Newland*, 87
2. Where the plaintiff and defendant, being constables, had each levied on the same property, pursuant to attachments in favor of different creditors, regular on their face, but really void as against the respective parties who procured them because of having issued on defective affidavits; *held*, that though the plaintiff levied first, and had taken possession, he could not maintain trespass *de bonis* against the defendant for a subsequent levy and taking under his attachment. *Horton v. Hendershot*, 118
- 3 It can make no difference, in such case, that the defendant stands indemnified by the persons under whose process he acted. *id*
4. Had the party whose property was taken sued either officer, the process would have been a defence. *id*
5. And had the creditor, in the attachment under which the plaintiff acted, sued him, because of the loss of the property, the want of jurisdiction would have been a defence. *id*

6. Mere irregularity in the process, however, would not be a defence. *id. note (c)*
7. The rule justifying an officer acting under process apparently regular, but really void as to the party, for want of jurisdiction, is one of *protection* merely. The officer may defend under such process, but he cannot build up a title upon it, so as to maintain actions against third persons. *id*
8. Where a sheriff broke an outer door of a house for the purpose of levying on goods of the occupant; *held*, that the levy being illegal, even a visitor at the house might lawfully resist the sheriff's attempt to remove the goods, using no more force than was necessary for that purpose. *Curtis v. Hubbard*, 336
9. Though the outer door of a house is closed merely by being *latched* in the ordinary way, the sheriff has no right to enter for the purpose of levying by virtue of a *fi. fa.* *id*
10. What would be a breaking of the outer door in burglary, will be equally a breaking by a sheriff who enters to make a levy. *id*
11. If the outer door be shut, the sheriff has no right to enter, though the owner or occupant be absent; for the house, under such circumstances, is equally a protection to his family and goods, as to himself. *id*
12. And, *semble*, the protection extends to the person and property of a guest within the house, unless he has gone there to avoid the process held by the sheriff; in which case the latter, after demanding leave to enter, and being refused, may break open the outer door. *id*
13. The revised statutes, as well as the act of 1821, providing for the annual salary to the district attorney of New-York, preclude that officer from a right to compensation *extra* the salary, on account of suits brought by him for fines and forfeited recognizances. *The People, ex rel. Phoenix, v. The Supervisors, &c. of New-York*, 362
14. A salary officer cannot rightfully claim compensation *extra* his salary for performing a new duty, or one imposed by the legislature since the salary was provided. *id*

15. An officer selling property at public vendue, is not bound to receive the bid of an infant : and therefore, on a sale under a tax warrant by a school district collector, where an infant bid a certain sum for the property, and the officer, without regarding his bid, struck it off to another for less ; *held*, that he was not liable to an action for the difference between the bids. *Kinney v. Showdy*, 544

16. In general, where a duty is imposed upon officers by statute, whether by words peremptory in themselves, or merely permissive, they have no discretion to refuse its performance as against a party having an absolute interest in it. *Martin v. The Mayor, &c. of Brooklyn*, 545

17. The acts of officers *de facto* are as valid, so far as the public is concerned, as though they were officers *de jure*. *The People, ex rel. Woodward, v. Covert and others*, 674

*See* ASSUMPSIT, 1 to 6.  
BOND, 1 to 7.  
CANAL COMMISSIONERS, 1 to 9.  
CERTIORARI, 4 to 9.  
CONTEMPT.  
CORPORATION, 1 to 4.  
COSTS, 14, 15.  
COURT OF SPECIAL SESSIONS, 1.  
DEPOSITIONS, 8, 9.  
EXCISE.  
HABEAS CORPUS, 1 to 3.  
INSOLVENT.  
MONEY LENT, 1.  
NOLLE PROSEQUI.  
PROHIBITION.  
STREETS, 9 to 11.  
SUPERVISORS.

#### OFFICES, SALE OF.

*See* BOND, 1 to 3.

#### ONUS PROBANDI.

*See* ARBITRATION AND AWARD, 17.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 38, 39.  
DEPOSITION, 4, 5, 7, 9.  
EJECTMENT, 1.  
EVIDENCE, 2, 15 to 19, 26, 27, 34.  
JURISDICTION, 4, 7.  
LIEN.  
PLEADING, 11.  
SURROGATE, 10.

*See* USURY, 8, 9.  
WAR AND PEACE, 1, 8

#### ORDER OF EVIDENCE.

*See* BILL OF EXCEPTIONS, 3.  
EVIDENCE, 28 to 30.

#### ORDER OF JUDGE OR COMMISSIONER.

*See* PRACTICE, 7.

#### ORDER OF SALE.

*See* SURROGATE.

#### ORDER TO PAY, &c.

*See* ASSUMPSIT, 1, 2, 5, 6.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 48 to 50.

#### OUTER DOOR.

*See* OFFICER, 8 to 12.

### P

#### PAROL EVIDENCE.

*See* ARBITRATION AND AWARD, 5, 8, 9, 10, 21, 26, 27, 30.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 41, 2.  
COSTS, 5.  
EVIDENCE, 3, 4, 32, 33, 43 to 43.  
RELEASE, 1 to 4.

#### PARTICULARS, BILL OF

*See* PRACTICE, 20 to 23, 31.

#### PARTIES TO ACTIONS.

*See* ABATEMENT, 1 to 5.  
ASSUMPSIT, 15.  
IDIOTS, LUNATICS, &c.  
INSURANCE, 7, 8, 9.  
PARTNERSHIP, 1.

See PLEADING, 7.

SCIRE FACIAS.

TENANTS IN COMMON, 1, 2, 5, 6.

WITNESS, 11, 12.

### PARTNERSHIP.

- 1 One of several partners cannot receive another into the firm without the consent of his copartners. But, *semble*, if the rest choose to adopt the arrangement, e. g. by joining the names of all in an action for a demand subsequently contracted, they may do so, and the action will be maintained. *Putnam and others v. Wise*, 234
- 2 C. loaned B. \$1000 for a year, leased him a building to be occupied as a store for the same period, and stipulated that his son should attend the store as B.'s clerk without specific compensation:—In consideration whereof, B. agreed to invest \$3000 in the store, conduct it during the year, and at the expiration thereof repay the \$1000 and surrender the premises if required, accounting for the business done, and rendering to C. *one equal third of all the profits, &c.*: HELD, sufficient to constitute a partnership, especially as to third persons. *Cushman and others v. Bailey & Conkling*, 526
- 3 One partner, after dissolution, cannot bind his copartners even by the renewal of a partnership note. *National Bank v. Norton, impleaded, &c.* 572
- 4 Nor will a power reserved to him in the articles of dissolution *to settle the business of the firm, and for that purpose to use their name*, enable him so to bind his copartners. *id*
- 5 The extent of a power *to settle*, considered and discussed. *id*
- 6 The acts of one partner, though after dissolution, will bind his copartners in respect to all persons who have previously dealt with them as a firm. except those to whom *actual notice* of the dissolution has been given. *id*
- 7 Notice of dissolution published in a newspaper, and thus accidentally reaching a bank director, is not equivalent to actual notice to the bank; especially where, by the charter, the director has no power to act for the institution save in conjunction with others. *id*

8. Otherwise, *semble*, of notice to a director with express instructions to communicate it to the board of directors. *id*

9. Two partners, A. & B., gave a bond and warrant of attorney to C. & D. to secure the latter for endorsements made and money loaned to the use of the firm. Afterward, they dissolved, A. assigning all his interest in the partnership effects to B., who thereupon agreed to indemnify A. against the partnership debts. The fact of the dissolution, as well as its terms, having been duly communicated to C. & D., they entered up judgment on the bond and warrant; and then went on loaning moneys to B., under an agreement with him, but without A.'s consent, that the judgment should stand as security for these loans also. HELD, that B.'s agreement was inoperative as to A., who might insist that the money collected under the judgment from the individual property of B., should go primarily to extinguish the debt for which the bond and warrant were originally given; and sufficient having been so collected, and an attempt then made to enforce the judgment against the individual property of A., a perpetual stay of proceedings was ordered as to him. *Williams & Macy v. Bush & Spicer*, 623

See ARBITRATION AND AWARD, 1 to 4, 7.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 35, 47.

FRAUD, 1, 11, 20, 21.

TENANTS IN COMMON, 1, 3, 4.

WITNESS, 7 to 9, 11, 12.

### PARTY IN INTEREST.

See COSTS, 4 to 12.

COURT OF SPECIAL SESSIONS, 5

EVIDENCE, 42, 43.

STREETS, 4, 8.

USURY, 7.

WITNESS, 11, 12.

### PAYMENT.

1. The promissory note of a debtor given for a precedent simple contract demand will not operate as payment, so as to preclude the creditor from suing on the original consideration, though given under an express agreement that it was to be received in full satisfaction and discharge: Otherwise, if the note be that of a *third person*. *Cole v. C. Sackett & E. Sackett*, 516

2. The case of *Arnold v. Camp*. (12 John. R. 409,) considered and disapproved. *id*

See ACCORD AND SATISFACTION, 1.  
ACTION, 1.

ARBITRATION AND AWARD, 1, 2, 3, 4.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 25, 30, 32, 44 to 47, 49.

EVIDENCE, 32, 33, 42, 43.

JUDGMENTS AND EXECUTIONS, 1, 2, 7, 8.

PARTNERSHIP, 9.

PUBLICANAL AND SURETY, 1, 4, 5

## PEACE.

See WAR AND PEACE.

## PETITION FOR SALE

See SURRENDER, 2 to 5, 7

## PHYSICIANS.

See MEDICAL SOCIETY.

## PLAINTIFF IN INTEREST.

See COSTS, 4 to 7.

COURT OF SPECIAL SESSIONS, 5.

EVIDENCE, 42, 43.

USURY, 7.

WITNESS, 11, 12.

## PLEA PUIS DARRIEN CONTINUANCE.

See COURT OF A JUSTICE OF THE PEACE, 7 to 9.

PLEADING, 4.

## PLEADING.

1. Covenant by the defendants to honor the plaintiff's drafts on them, to a given amount, and authorizing him, with the funds thus raised, to purchase a steam engine, &c. to be used in a common enterprise, they moreover to defray his necessary expenses incurred in preparing for and prosecuting the enterprise: Breach, that the defendants did not honor, &c. a draft drawn by the plaintiffs, with the consent of the defendants, none of them who accepted it:

Held, not a sufficient breach—the defendants being only bound to honor drafts when drawn on all. *Glover v. Tuck, Ewen and others*, 66

2. Held, also, that a breach alleging a refusal to provide funds after request, &c. for the purchase of a steam engine, was bad; there being no covenant to provide funds for that purpose independently of the drafts. *id*

3. But a breach was held well assigned, which alleged a refusal, after request, &c. to defray expenses of the plaintiff necessarily incurred, the declaration showing for what the expenses were incurred, and thus, that they were necessary expenses within the covenant. *id*

4. Though a judge at the circuit may receive a plea *puis darrien continuance*, without proof of its truth; yet, it seems, he should reject it, unless verified in some way. *West v. Stanley*, 69

5. A demurrer for misjoinder of counts must be to the whole declaration; the defect cannot be reached under a demurrer to particular counts. *Ferris & Eaton v. The North American Fire Insurance Company*, 71

6. Doubtful phraseology in a pleading, is to be construed most strongly against the pleader. *id*

7. In *assumpsit*, a plea of misjoinder of plaintiffs would be bad, as amounting to the general issue; but otherwise, in *covenant*. *id*

8. Where, in trespass, assault and battery, and false imprisonment, the defendant pleaded the general issue to all except the false imprisonment, and as to that, a special plea, setting out a warrant for felony issued by a justice of the peace, and that by virtue thereof he arrested the defendant, &c.; held, that a replication protesting the warrant, and its delivery to the defendant to be executed, and then replying *de injuria sua propria absque residuo causæ*, was good. *Stickle v. Richmond*, 77

9. Such a replication is not open to the objection, that it attempts to put in issue several distinct matters, or that the traverse is taken to a mere conclusion of law. *id*

10. The general replication, *de injuria*, &c. to such a plea, would be bad:



- and, in this respect, the rule is the same, whether the justification be under process from a court of record, or not of record. *id*
11. A replication like the one in question admits, *it seems*, the warrant in the defendant's hands, and devolves on the plaintiff the *onus* of showing that, though the defendant had the warrant, he did not make the arrest by virtue of it. *id*
12. Had the plaintiff intended to rely on a different arrest from the one justified, or on the act having been done under some pretended authority, other than the warrant, he should have new assigned, or replied setting up the special matter. *id*
13. In debt on bond, conditioned to pay a sum of money for the plaintiff on a bond and mortgage executed between third persons, and to save the plaintiff harmless, &c.; held, that a breach, alleging merely that the sum became due, &c. and was not paid at the day, was well assigned, though it did not show that the plaintiff had been actually damnified. *Thomas v. Allen*, 145
14. The case of *Douglas v. Clark*, (14 John. R. 177,) *contra*, is overruled. *id*
15. Such a bond is more than a bond of indemnity—it imposes a positive obligation to pay at the day. *id*
16. A special plea setting up matter beyond a simple denial of what the plaintiff, under the general issue, would be bound in the first instance to prove, is not bad as amounting to the general issue, even though the matter would be evidence without being pleaded. *Hollister and another v. Bender*, 150
17. Where, to a declaration in debt on simple contract, the defendant pleaded *non assumpsit*, and a set-off against the promises mentioned in the declaration; held, that the plaintiff might treat the plea as a nullity, and enter the defendant's default. *Van Vechten v. Cowell*, 203
18. In trespass *de bonis*, a plea that the goods in question were the property of a third person, and that the defendants took them by virtue of an attachment against him, is held as amounting to the general issue; for it involves a denial of the plaintiff's possession, and therefore gives no color to the action *Brown and another v. Artcher and Van Vleit*, 266
19. Otherwise, if the plea surmise a possession in the plaintiff under some defective title. *id*
20. The same general doctrine applies in trespass *quare clausum fregit*, with respect to a plea of title in a third person, under whose authority the defendant entered, &c.; for the plea is a virtual denial that there was any trespass. *id*
21. The usual test in ascertaining whether a plea amounts to the general issue, is to see if it takes away all color for maintaining the action, by fixing a negative on the plaintiff's right in the first instance. *id*
22. A count in case for a tort, cannot be joined with one upon contract. *Martin v. The Mayor, &c. of Brooklyn*, 545
23. Where one of two defendants, in answer to a declaration on a joint promise of both, pleaded that he did not undertake and promise within six years, &c.; held, good in substance, as the plea amounted in legal effect to a denial of a promise by either. *Stillell, adm'r, &c. v. Hasbrouck, impleaded with Wyckoff*, 561
24. *Non assumpsit infra sex annos*, is no answer to a count on a promissory note payable at a day subsequent to its date. *id*
25. A plea purporting in form to answer the whole declaration, but containing matter which legally answers only a part of it, is bad. *id*
26. In a suit on a judgment of a court of a neighboring state, the plea showed the judgment void for want of jurisdiction as to the person of the defendant; and held, that a replication stating the defendant to have been personally duly notified by the officer who served the process by which the suit was commenced, &c. without showing to what the notice related, was bad in substance. *Long v. Long*, 597
27. So, of a replication that the defendant had personal notice of the commencement of the suit, &c., it not appearing who gave him notice. *id*

28. The words, *personally notified*, are improper in pleading, where the object is to show that a court had acquired jurisdiction of the person of the defendant. The averment should be, that *he was served with process to appear, &c.*; or, *that he appeared in the action, &c.* id

29. A plea to the jurisdiction of a superior court should show that there is another court of the same state or country in which effectual justice may be done. *Otis and another v. Wakeman*, 604

30. *Semble*, a plea of *not guilty within three years*, instead of *actio non accrevit, &c.*, is bad. *Fisher v. Pond*, late sheriff, &c. 672

See ABATEMENT, 1 to 5.  
AMENDMENT, 1 to 4.  
ASSUMPSIT, 4, 5, 6, 16.  
BAIL, 2 to 6.  
COSTS, 1, 2.  
COURT OF A JUSTICE OF THE PEACE, 1, 2, 7, 8, 9.  
EJECTMENT, 3 to 6.  
EVIDENCE, 16 to 19, 42, 43.  
INSURANCE, 3 to 9.  
PRACTICE, 16 to 23, 31, 35, 38.  
PROMISE, 3.  
REPLEVIN, 1.  
SCIRE FACIAS.  
VARIANCE.

## POLICY OF INSURANCE.

See INSURANCE.

## POSTMASTER.

The postmaster general is not liable for the nonfeasance of a deputy postmaster, though the latter holds by appointment from the former. *Martin v. The Mayor, &c. of Brooklyn*, 545

## POWER.

i. Where a naked power to sell lands, was given by will, accompanied by a direction, that the *moneys arising from the sale should be invested, &c.* for the purposes of the will: *Held*, that according to the obvious import of the power, the sale must be for *cash*, or something which could be invested; and a deed under it, reciting facts which showed

that the grantor conveyed partly for money, and partly in consideration of an equitable claim of the grantee, was held a departure from its purpose, and therefore void. *B. Waldron and Sally Ann his wife v. Mary C. P. McComb*, 111

2. A naked power to sell must be pursued, both in respect to its purpose or object, and the forms prescribed in it; and, *semble*, a deed under it, exhibiting a defect in either particular, is void, both at law, and in equity. id

3. So, *semble*, in respect to sales under powers of a public nature; e. g. by collectors of taxes, or executors or administrators in virtue of a surrogate's decree for the payment of debts, &c. id

4. A statute authority by which one may be deprived of his estate, must be strictly pursued. *Bloom and another v. Burdick*, 130

See ARBITRATION AND AWARD, 5, 7 to 9, 11 to 30.

ATTORNEY AND COUNSEL, 4, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 35.

CANAL COMMISSIONERS, 1 to 9.

CERTIORARI.

CORPORATION, 3.

DEED, 8.

INSOLVENT.

JURISDICTION.

PARTNERSHIP, 1, 3 to 9.

## PRACTICE.

1. Where, by consent of parties, a general verdict was taken at the circuit, subject to the opinion of this court as to certain questions raised at the trial, and the facts were neither agreed on, nor found by the jury, agreeably to the standing rule on that subject, the court ordered a new trial because of the omission. *Banyer v. Ellice*, 23

2. The rule referred to requires quite as much fullness and certainty, respecting the facts, in a case made, as in a special verdict. id

3. The venue in a criminal cause may be changed on motion of the public prosecutor, if it appear that a *fair and impartial trial* cannot be had in the county where the indictment was found. *The People v. Webb*, 179

4. There is no fixed rule defining what shall or shall not be received, as proof of the fact that such trial cannot be had. *id*
5. The venue may be changed, though there has been no *actual experiment* made, by way of trying the cause, or even empanneling a jury, in the county where the venue is laid. *id*
6. The cases of *Bowman v. Ely*, (2 Wend. 250,) and *Messenger v. Holmes*, (12 *id.* 103,) reviewed and explained. *id*  
  
An order made by a supreme court commissioner to stay the proceedings of a collector of taxes on his warrant, with a view to a motion, is a nullity, and may be disregarded without any formal *vacatur*. *The People, ex rel. Onderdonk, v. The Supervisors of Queens County*, 195
8. Where it is intended to hold the defendant to bail in an action for a breach of a promise to marry, the *ac etiam* clause in the *capias ad responsum* is sufficient if it be in the ordinary form in assumpsit, thus—"and also, &c. upon promises"—without adding any thing indicating the particular nature of the promises. *Hapeman v. Woolford*, 202
9. A writ of replevin, though returnable before "the justices," &c. instead of "our justices," and mentioning no place of return, is amendable. *Cutler and others v. Rathbone, sheriff, &c.* 204
10. A variance between the writ, and summons, as to the nature of the action, the writ being in the *detinet*, and the summons in the *cepit et detinet*, is immaterial. *id*
11. Otherwise as to a similar variance between the writ and declaration. *id*
12. The summons is a mere notice, and is sufficient, it seems, if it fairly apprise the defendant of the action being replevin, of the name of the plaintiff and his attorney, of the court whence the writ issued, and the time and place for the defendant to appear. *id*
13. A mistake in returning a writ to the wrong clerk's office, is not ground for setting aside the proceedings; the statute on this subject being merely directory. *id*
14. Though the affidavit of property, &c. in replevin, may be made by a third person in behalf of the plaintiff, he must do it from facts within his personal knowledge, independent of mere hearsay of the party or others; and where the affidavit was so drawn as to raise the inference of its having been made upon hearsay, it was held insufficient, but amendable upon terms. *id*
15. In this case, the replevin bond was executed by one surety, and no other person, leaving blanks for the names of the obligee and the person from whom the property was to be replevied; and in that condition it was attested by a witness, but before the writ was executed, the blanks were filled up by authority from the surety, in the attesting witness' absence. *Held*, on motion to set aside the proceedings, that the plaintiff might have leave to amend upon terms, by filing a new bond. *id*
16. In verifying a plea under the 1st rule of May term, 1840, it is not sufficient to swear to a *defence on the merits* generally. The affidavit must point to the particular demand on which the action is brought. *Culder v. Lansing*, 212
17. But where the declaration was on an award pursuant to a *parol submission*; *HELD*, that the case was not within the act of 1840, and therefore the plea need not be verified by affidavit. *id*
18. If the action is founded either wholly or in part on a *parol agreement*, the defendant may plead without an affidavit of merits. *id*
19. *It seems*, that had the submission been *in writing*, the case might have been brought within the statute and rule mentioned. *id*
20. Where a declaration on the money counts was served, with a notice that certain notes, copies whereof were subjoined, would be given in evidence, but not restricting the plaintiff's claim to those demands; and the defendant put in a plea of the general issue without an affidavit of merits: *Held*, that the plaintiff could not afterward amend under the 22d rule, by serving a copy of the declaration in the same words as the one before delivered, with a notice that the notes, copies of which were again given, constituted the *only cause of action* relied on. *Chrysler v. James*, 214

21. Such a notice is not a *bill of particulars*, either in terms or legal effect. *id*
22. *It seems*, that if a plaintiff has served a *bill of particulars* with his original declaration, he will be entitled to amend under the rule in question, by changing the form of the particulars. *id*
23. For most purposes a bill of particulars is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of the pleading. *id*
24. A party moving to quash or supersede a writ for some defect therein, must point out the defect, either in his affidavit or notice of motion. It is not enough that the papers on which he moves contain a copy of the writ, in which the defect appears. *Wilson v. Wetmore*, 216
25. Service of papers through the post office, under rule 4th, of May term, 1840, is ineffectual, unless the entire postage legally chargeable thereon be paid. So *held*, where the person mailing them paid as for a *double* letter, that being all the postmaster demanded, though *treble* postage was the legal charge: and the postmaster at the office to which the letter was directed, corrected the charge, and demanded the balance, in consequence of which the attorney for whom they were intended refused to take them out. *Anon.* 217
26. If the papers are properly mailed, the attorney to whom they are sent takes the risk of all accidents. *id*
27. It is not enough, however, that the papers are directed to the attorney; they must be *enclosed in a wrapper*, &c. *id*
28. A motion for judgment as in case of nonsuit was denied, but without costs, where the defendant had prevented a trial by entering a *ne recipiatur* which the circuit judge refused to vacate; the plaintiff's attorney now swearing that he was unaware of the rule requiring the circuit roll to be filed the first day of the circuit, and it not appearing that any of the defendant's witnesses had left court before the cause was reached. *Ogdensburg Bank v. Tift*, 222
29. *It seems*, that if the excuse now offered for not filing the circuit roll had been made to appear on the motion for *vacatur* before the circuit judge, the present motion would have been denied with costs. *id*
30. *Quere*, whether the practice of entering a *ne recipiatur* is not abolished, as to cases within the act of 1840 dispensing with both circuit roll and *postea*. *id*
31. Where a declaration containing the money counts was served, to which was subjoined the copy of a note, with a mere notice that it would be given in evidence, and the defendants demanded a bill of particulars, which the plaintiff delivered, therein stating that the note was the *only* cause of action relied on; *held*, that a plea subsequently served might be disregarded, unless verified by affidavit. *Comstock v. Merritt and others*, 369
32. Where there are several plaintiffs in a cause, it is no objection to an affidavit therein that the christian name of one of them is omitted in the title. *Maury and another v. Van Arnum*, 370
33. If there be several plaintiffs or defendants in a cause, the papers may be entitled *A. B. and another* or *others*, according to the fact. *id*
34. Where a party moved to strike out pleas as *false* and *frivolous*, his notice not specifying any ground for the motion, and his affidavits alleging only that the pleas were *false*; *held*, he could not avail himself of the *frivolousness* of the pleas. *id*
35. Where a plea has been duly verified pursuant to the first rule of May term, 1840, this will be a sufficient answer to a motion to strike it out as *false*; no new affidavit being required in such case. *id*
36. Where the maker and endorsers of a note are sued together under the act of 1832, and a verdict passes in favor of all the defendants, without any severance of the action, only one judgment can be perfected against the plaintiff. *Aeby v. Rapelye and others*, 371
37. But if there be a severance either before or on the trial, a defendant who succeeds may perfect a separate judgment, without reference to his co-defendants. *id*
38. The first rule of May term, 1840, as to verifying pleas, only applies to cases

- where it appears that the *whole* cause of action is on one or more written instruments or records. Hence, where the declaration contained two special counts on a promissory note, together with the money counts, and no notice was given that the note was the *only* cause of action relied on; *held*, that a plea of the general issue to the whole declaration, not verified according to the above rule, could not be disregarded. *Carr v. Richardson*, 372
39. A defendant cannot be held to bail without a judge's order, in an action on contract, (e. g. a promise of marriage,) where the damages can only be rendered certain by the verdict of a jury. *Bromley v. Town*, 373
40. The revised statutes have changed the rule which prevailed when the case of *Bunting v. Brown*, (13 *John. Rep.* 425,) was decided. *id*
41. Where the defendant served papers for a motion to change the venue from the county of S. to the county of M., together with an order to stay proceedings until the decision of the motion; *held*, that the plaintiff, within the time specified in the 23d rule, might nevertheless amend his declaration, by changing the venue to the county of A. *Wolrerton v. Wells*, 374
42. In such case, if it appear, on the motion, that the plaintiff has a sufficient number of witnesses to retain the venue in the county to which he has changed it by his amendment, and the defendant has had time to serve new papers since the amendment, but has omitted so to do, the motion will be denied. *id*
43. After the plaintiff had executed a writ of inquiry, the defendant's attorney agreed to waive a motion he was about making to set aside the proceedings, and gave a cognovit for the same amount at which the damages had been assessed: whereupon the plaintiff's attorney stipulated not to perfect judgment until a specified period thereafter, but delivered the stipulation upon an express parole condition, that the defendant should pay all the disbursements attending the execution of the writ of inquiry, which the latter neglected to do, though repeatedly requested:—*Held*, that the 63d rule did not apply to the case, and that the plaintiff was regular in perfecting judgment on the inquiry in disregard of the terms of his stipulation. *Turner v. Burrows*, 621
44. Under the act of May 14th, 1840, (*Sess. Laws* 1840, p. 327,) judgment may be entered in *vacation*, on a writ of inquiry returnable at the succeeding term. *id*
45. In cases within that act, a writ of inquiry is valid, though returnable in *vacation*. *id*
46. Proof of service of papers on an agent or a clerk of court, is *prima facie* sufficient, without expressly showing the special circumstances required by rule 8th as constituting a proper case for such service. *Ayrault v. Houghtailing*, 635
46. An affidavit of merits, that the party "has fully and fairly stated *the facts of his case*," &c. is insufficient; it should be that he "has fully and fairly stated *the case*," &c. *Fitzhugh v. Truax*, 644
47. The affidavit may be that he has stated *this case*, or *his case*, but not *his defence*. *Id. Note (a)*.
48. Nor will it do to qualify the phraseology by adding, "*so far as the facts have come to his knowledge*," or in any other manner, unless a sufficient excuse therefor be expressly shewn. *Id. Note (a)*.
49. Where a motion was opposed on an affidavit made by one who had refused to testify for the moving party, the court denied the latter a commission to compel the witness to be examined pursuant to 2 *R. S.* 457, 8, §§ 24, 25, 2d ed., on the ground that the affidavit was full to the merits of the motion, and showed that a further examination would be useless. *Ryers v. Hedges*, 646
50. And, *semble*, a commission will be denied under such circumstances, if the adverse party produces the witness' affidavit *touching the matters in question*; for it will be presumed that he has told the *whole truth*, till the contrary appear. *id*
51. A defendant in ejectment obtained an injunction from chancery against the further prosecution of the suit, whereupon the plaintiff discontinued it, and instituted a new ejectment for the

- same matter, in which he obtained judgment by default; *held*, that the existence of the injunction formed no ground for treating the default as irregular, or for ordering a stay of the plaintiff's proceedings. *Burt v. Mapes*, 649
62. This court has no power to aid in enforcing an injunction against proceedings at law, and can take no notice of the injunction, except as a ground for relieving the party enjoined from the effect of delay, or the omission of some necessary step in the cause. *id*
53. The case of *Hoyt v. Gelston*, (13 *John. Rep.* 139,) reviewed, and some of its *dicta* disapproved. *id*
54. A notice of special matter accompanying a plea of the general issue, will not be struck out as frivolous, if it contain what may plausibly be urged in bar of the action. *Lowry v. Hall*, 663
55. The main reason for striking out frivolous *pleas*, (*viz.* delay,) does not apply to a notice. *id*
56. A notice, however, containing matter palpably *absurd* and *impertinent*, will be stricken out. *id*
57. An affidavit to change venue on the ground of witnesses residing in another county, need not show the nature of the action. *Anonymous*, 668
58. Nor need it state the county where the cause of action arose. *id*
59. The doctrine of *Franklin v. Underhill*, (2 *John. Rep.* 374,) and *Tillinghast v. King*, (6 *Cowen's Rep.* 591,) declared inapplicable to cases of this kind since the revised statutes. *id*
60. The affidavit need not be, in terms, that the party "has fully and fairly disclosed the facts he expects to prove," &c.; but will be sufficient, in this respect, if it set forth simply that "he has stated the facts," &c. *id*
61. Nor is it essential that, in respect to the value of the expected testimony, it should say, the witnesses are each, &c. material "to his defence;" other equivalent words may be substituted—as, that they are material, &c. "for the defendant," &c. *id*
62. Though the action be *debt*, if it be brought on an account, and the defendant suffers interlocutory judgment by default, the plaintiff's damages must be assessed under a writ of inquiry. *Wilson v. Darwin and another*, 670
63. Where a motion to strike out a plea as false, raises a question of *law* rather than of *fact*, it will be denied. *Fisher v. Pond, late sheriff, &c.* 672
64. Accordingly, in case against a sheriff for neglect to return an execution, it appearing that the execution was returnable more than three years before suit commenced; *held*, that a plea of *not guilty within three years*, could not be struck out as false, on an affidavit proving the neglect to return it. *id*
65. *Quere*, whether the statute of limitations commences running, in such case, immediately after the return day of the execution? *id*
- See ADMINISTRATOR, 1.  
AMENDMENT, 1 to 4.  
ARBITRATION AND AWARD, 10, 30.  
ATTORNEY AND COUNSEL, 4.  
BAIL IN CIVIL CASES, 2 to 6.  
CERTIORARI, 1 to 9.  
CONTEMPT.  
COSTS.  
DEBTORS, ABSCONDING, CONCEALED, &c. 1, 2, 3.  
DEMURRER TO EVIDENCE.  
DEPOSITION.  
EJECTMENT, 5, 7.  
EXCISE.  
HABEAS CORPUS.  
IMPRISONMENT.  
JUDGMENTS AND EXECUTIONS, 4 to 9  
MANDAMUS, 1, 2.  
PARTNERSHIP, 9.  
PLEADING, 4, 17.  
PROHIBITION, 1, 2.  
REPLEVIN, 4.  
SET-OFF.  
SCIRE FACIAS.  
STREETS, 4, 8.  
SUPERVISORS, 5 to 7, 14, 15.  
SURROGATE, 1 to 5, 8, 9.
- PRACTICE AT THE TRIAL
- See BILL OF EXCEPTIONS.  
COURT OF A JUSTICE OF THE PEACE 3 to 5.  
DEMURRER TO EVIDENCE.  
EJECTMENT, 5.  
EVIDENCE, 23, 24, 28 to 30.  
INQUEST.  
JURY, 1 to 4.



See PLEADING, 4.  
PRACTICE, 1, 2, 28 to 30.

## PRECEDENT, JUDICIAL

See COURT OF ERRORS, 1.

## PRECEPT.

See CONTEMPT, 13.

## PRESUMPTION AND PRESUMPTIVE EVIDENCE.

See ARBITRATION AND AWARD, 17, 25 to 28.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 35, 38, 39, 43.

CANAL COMMISSIONERS, 8.

CONTEMPT, 2, 3, 7, 8.

DEMURRER . EVIDENCE, 1, 2, 4, 5.

DEPOSITION, 4, 5, 7, 8, 9, 12.

EVIDENCE, 1, 26, 36, 37.

JURISDICTION, 1, 4, 5, 7.

MARRIAGE, 1, 2, 5.

PRACTICE, 50.

PRINCIPAL AND AGENT, 1.

PROMISE, 6.

USURY, 8.

WAR AND PEACE, 1, 8.

## PRINCIPAL AND AGENT.

1. It is not necessary, in order to authorize the inference of general agency, that the person should have done an act the same in *specie* with that in question; if he have usually done things of the same general character and effect, with the assent of his principal, that is enough. *Commercial Bank of Lake Erie v. Norton & Fox, impleaded, &c.* 501

2. An agent cannot delegate any portion of his power requiring the exercise of *discretion* or *judgment*: otherwise, however, as to powers or duties merely *mechanical* in their nature. *id*

3. Hence, if empowered to bind his principal by an accommodation acceptance, he may direct another to write it, having first determined the propriety of the act himself; and it will bind the principal, though naming the delegate, and not the agent, as the one exercising the power. *id*

4. Married women, lunatics, infants, and other persons not *sui juris*, are, in general, incapable of appointing an agent or attorney. *Snyder v. Sponsable,* 567

See ASSUMPSIT, 1 to 6.

BILLS OF EXCHANGE AND PROMISSORY NOTES, 19, 20, 25, 33, 35.

PARTNERSHIP, 3 to 9.

PROMISE, 4 to 6.

STEAMBOATS

SUNDAY.

## PRINCIPAL AND SURETY.

1. P., together with C. & G., his sureties, gave a bond to the plaintiffs, which, after reciting a written contract of P and the plaintiffs with B., and that the plaintiffs and P. jointly owed B. a sum of money thereon, was conditioned that P. should pay that money, or save the plaintiffs harmless, &c. Afterward, B. sued P. and the plaintiffs for the money, who put the cause at issue, suffered an inquest to be taken against them at the circuit; and then the plaintiffs, before judgment, settled with B., giving their negotiable note for the amount of the verdict and B.'s taxable costs, which he received in full satisfaction. *Held*, that P., not only, but the sureties, were liable on the bond for the amount of the recovery and B.'s taxable costs. *Lee and others v. Clark, impleaded with Parmenter,* 56

2. *Held*, also, that the verdict, proved by the circuit roll and clerk's minutes of trial, was admissible against the sureties, as well as P., to show the amount of damages; and this, though the sureties had no notice of that suit. *id*

3. Where parties, whether principals or sureties, stipulate to pay a third person, or indemnify the debtor, a verdict against the latter, by reason of their default, is at least *prima facie*, not to say conclusive evidence against them, without their having been notified of the former suit. *id*

4. The plaintiff's negotiable note, given and accepted in full satisfaction of B.'s recovery and costs, was equivalent to a cash payment by them. *id*

5. So, *semble*, had the note not been negotiable in its character. *id*

6. The recital in the bond, of the contract with B. as having been *executed by*

*him*, was primary, and, *it seems*, conclusive evidence against the obligees, of B's execution of it; thus superseding the necessity of proving that fact, in an action against P. and his sureties on the bond; and this, though the contract, when produced, purported to have been signed by another as attorney for B. *id*

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 8, 9, 15, 16, 36, 37, 42.  
**JUDGMENTS AND EXECUTIONS**, 7, 8.  
**REPLEVIN**, 2 to 4.

### PRIVILEGE OF PARTY IN INTEREST.

See **USURY**, 7.  
**WITNESS**, 10 to 12.

### PRIVILEGED COMMUNICATIONS.

See **EVIDENCE**, 4 to 13.

### PROCESS.

See **ATTORNEY AND COUNSEL**, 1.  
**CANAL COMMISSIONERS**, 5 to 7  
**CONTEMPT**.  
**HABEAS CORPUS**.  
**JURISDICTION**, 2, 3, 6, 7, 9.  
**LANDLORD AND TENANT**.  
**OFFICER**, 2 to 12.  
**PLEADING**, 8 to 12, 26 to 28.  
**PRACTICE**, 8 to 13, 24, 39, 44, 45.  
**PROHIBITION**, 1, 2.  
**SCIRE FACIAS**.

### PRODUCTION OF PAPERS ON SUBPENA.

See **EVIDENCE**, 5, 6, 7.

### PROHIBITION.

1. A writ of prohibition does not lie to a ministerial officer, (e. g. a collector of taxes,) to stay the execution of process in his hands, but only to a court in which some legal proceeding is pending, and to the party prosecuting the proceeding. *The People, ex rel. Onderdonk, v. The Supervisors of Queens County*, 195

2. The case of *The People v. Works*, (7 *Wendell*, 486,) commented on and explained. *id*

### PROMISE.

1. Where a debt has been discharged by accord and satisfaction for less than its amount, there remains no such moral obligation to pay the balance as will support a subsequent promise to that effect. *Stafford v. Bacon*, 53?
2. Otherwise, of a discharge which is not the mere act of the party, but by operation of law: e. g. an insolvent discharge. *id*
3. Where the plaintiff relies on a subsequent promise to pay a debt previously discharged, he must declare upon or reply it specially; and cannot avail himself of it under general pleadings. *id*
4. A mere casual expression to a stranger of one's intent to pay a debt discharged by operation of law, cannot be made available as a new promise to the creditor. *id*
5. Otherwise, *semble*, where it is intended by the debtor that a promise by him to a stranger should be communicated to the creditor; for the latter may then adopt the act of the stranger receiving it, and thus make him an agent. *id*
6. *Quere*, whether, the promise being to the son of the creditor, the jury may presume from this that the debtor intended it for the creditor. *id*

See **ASSUMPSIT**.

**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 49, 50.  
**MARRIAGE**, 1, 3, 4, 5  
**PLEADING**, 23.  
**STREETS**, 10, 11.  
**TURNPIKE LAW**, 1.

### PROMISSORY NOTE.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**

### PROPERTY IN A THIRD PERSON.

See **EJECTMENT**, 1, 2, 8.  
**PLEADING**, 18 to 21.  
**REPLEVIN**, 1.



**PROTECTION BY COMMAND OF  
FOREIGN SOVEREIGN.**

See **CRIMES**, 5 to 8.  
**WAR AND PEACE**, 6 to 8.

**PROTECTION BY PROCESS, &c.**

See **CANAL COMMISSIONERS**, 1 to 9.  
**HABEAS CORPUS**, 1.  
**OFFICER**, 2 to 12.  
**PLEADING**, 8 to 12.

**PROTEST.**

See **BILLS OF EXCHANGE AND PROMISSO-  
RY NOTES**, 1, 19 to 24.

**PURCHASER FROM A FRAUDU-  
LENT VENDEE.**

See **FRAUD**, 4 to 9, 17.

**Q****QUIET ENJOYMENT.**

See **DAMAGES**.  
**WITNESS**, 5, 6.

**R****RAPE.**

1. Where the prisoner decoyed a female under ten years of age into a building for the purpose of ravishing her and was there detected while standing within a few feet of her in a state of indecent exposure; *held*, that though there was no evidence of his having actually touched her, he was properly convicted of *an assault with intent to commit a rape*. *Hays v. The People*, 351
2. The consent of a female of that age, or even her aiding the prisoner's attempt, is no defence. *id*
3. An *assault*, is an attempt with force or violence to do corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent,

coupled with a present ability, to use violence against the person. *id*

4. It is not essential, to constitute an assault, that there should be a *direct attempt* at violence. *i.*

**RATIFICATION**

See **FRAUD**, 3, 16, 28 to 32.  
**PARTNERSHIP**, 1.  
**TENANTS IN COMMON**, 2, 5

**READINESS TO PERFORM**

See **EVIDENCE**, 34 to 37.

**REALTY.**

See **FIXTURES**, 1 to 4.

**RECITAL**

See **BOND**, 7.  
**CONTEMPT**, 1, 3, 7, 8.  
**PRINCIPAL AND SURETY**, 6

**RECOGNIZANCE.**

See **BAIL IN CIVIL CASES**, 3 to 6.

**RECOUPMENT.**

See **BILLS OF EXCHANGE AND PROMISSO-  
RY NOTES**, 7, 11 to 14.  
**FRAUD**, 28, 29, 30.

**REDEMPTION.**

1. The right of a judgment creditor to redeem from a mortgage sale, acquired by the *act of April 18th, 1838*, (*Sess. L. 1838, p. 261*), became extinct on the 1st of November following. *Butler v. Palmer*, 234
2. Notwithstanding the *act of May 12th, 1837*, (*Sess. L. 1837, p. 455*), gave the assignee of a mortgagor the right of redeeming at any time within a year from a sale under the mortgage; yet that right, though acquired before the

act of April 8th, 1838, became extinct by operation thereof from and after the 1st of November following, whether the year had then expired or not. *id*

5. A statute, though operating to lessen the time allowed for the exercise of a previously existing right, (e. g. a right to redeem,) is not therefore unconstitutional. *id*

4 Whether the *act of April 18th, 1838*, would have been constitutional, had it attempted to take away existing rights of redemption absolutely, *quere.* *id*

5. There is no provision in the law for a concurrent redemption of lands sold on execution, by two different creditors holding judgments docketed at the *same instant*; but the one first complying with the terms for redeeming from the purchaser will be entitled to the sheriff's deed, unless the other creditor redeems from him; and this, though the judgments were docketed under a stipulation that any sums collected thereon should be shared by the creditors in proportion to the amount of their respective judgments. *Ex parte Ives*, 639

6. One creditor redeeming from another, under such circumstances, is bound to tender *the amount paid by the latter, with interest thereon*; and where he merely tendered *the amount of the original bid*, with interest on that, *held*, insufficient. *id*

#### REFEREES.

*See COSTS*, 13.  
*USURY*, 4, 5.

#### RELEASE.

1. Where F., one of two common carriers jointly charged by the plaintiffs with negligence, agreed with the plaintiffs by simple contract in writing, that if the latter would release T., the other carrier, it should not affect or impair any liability which he, F., might have incurred or was subject to; and thereupon T. was released accordingly: *Held*, that F.'s agreement, not being under seal, did not qualify the release, so as to prevent its operating the discharge of both F. and T. from the original cause of action; and that the plaintiff's remedy was confined to the

substituted agreement of F. *Bronson and others v. Fitzhugh, impleaded with Throop*, 185

2. A release of one of several joint wrongdoers or contractors, in general discharges all. Otherwise, *semble*, where all are parties to the release, and those not in terms discharged, covenant in it to remain liable. *id*

3. Whether, in case of the release of a joint debtor thus qualified, the remedy of the creditor is not confined to the new obligation arising out of the deed, *quere.* *id*

4. The legal effect of a sealed contract cannot be varied by a contemporaneous written contract without seal. *id*

*See ACCORD AND SATISFACTION.*  
*ACTION*, 2.  
*WITNESS*, 7 to 9.

#### RELIGIOUS SOCIETY.

*See ASSUMPSIT*, 1 to 6.

#### RENT.

*See BILLS OF EXCHANGE AND PROMISSORY NOTES*, 49, 50.  
*DISTRESS.*  
*LANDLORD AND TENANT*, 1.  
*FRAUD*, 28, 29.  
*TENANTS IN COMMON*, 1, 9, 10, 11.

#### REPAIR OF BRIDGES.

*See SUPERVISORS*, 1 to 7.

#### REPAIR OF CANALS.

*See CANAL COMMISSIONERS*, 8, 9.

#### REPEAL OF STATUTES

*See STATUTES.*

#### REPLEVIN.

1. In replevin, a plea of property in a third person is good, and entitles the defendant to have return thereof, without

connecting himself with the right of such person, or making avowry. *Ingraham v. Hammond & Mead*, 353

2. It is no defence to an action against sureties in a replevin bond, that they were excepted to, and failed to justify. *Van Duyne, late sheriff, &c. v. Coope*, 557

3. *Quere*, whether the complete substitution of new bail, as a consequence of the exception, would constitute a defence. *id*

4. The doctrine that *special bail* may be displaced by their failure to justify after exception, has no application to the case of sureties in a replevin bond; yet, even in respect to the former, the matter cannot be interposed as a defence by plea to an action on the recognizance, but only operates as ground for ordering an *exoneretur*. *id*

*See* COSTS, 14, 15.  
FRAUD, 7, 12 to 17, 20, 21.  
MORTGAGE OF CHATTELS, 1, 2.  
PRACTICE, 9 to 15.

#### REPLICATION.

*See* EVIDENCE, 42, 43.  
PLEADING, 8 to 12, 26 to 28.  
PROMISE, 3.

#### REPRESENTATION.

*See* INSURANCE, 13 to 16.

#### REPUBLICATION OF WILL.

*See* WILL.

#### RES JUDICATA.

*See* ARBITRATION AND AWARD, 1 to 5.  
CANAL COMMISSIONERS, 3.  
DEBTORS, ABSCONDING, CONCEALED, &c. 3, 4.  
EVIDENCE, 44.  
JUDGMENTS AND EXECUTIONS, 9.  
JURISDICTION.  
PRINCIPAL AND SURETY, 1 to 5.  
SCIRE FACIAS.  
SUPERVISOR, 8 to 15.  
SURROGATE.

#### RESCINDING CONTRACT.

*See* FRAUD, 1, 3, 7, 10 to 18, 28 to 30

#### RESIDUARY LEGATEE OR DEVISEE.

*See* WILL.

#### RESISTING AN OFFICER

*See* OFFICER, 8 to 12

#### RETURN.

*See* DAMAGES, 3, 4.  
DEPOSITION, 6, 7, 8, 9.  
HABEAS CORPUS, 3 to 10.  
LANDLORD AND TENANT.  
PRACTICE, 13, 64, 65.

#### REVOCATION.

*See* ARBITRATION AND AWARD, & WILL.

#### RIGHT TO BEGIN.

*See* EVIDENCE, 29, 30.

#### RIGHTS, VESTED

*See* STATUTES.

#### RULE OF COURT.

*See* ATTORNEY AND COUNSEL, 4.  
CONTEMPT, 1, 7, 8, 11 to 15.  
HABEAS CORPUS, 1, 2.  
JUDGMENTS AND EXECUTIONS, 9.

#### S

#### SALARY.

*See* OFFICER, 13, 14

#### SALE AND DELIVERY

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 7.

See FRAUD, 1 to 27, 30, 31, 32.  
WEIGHTS AND MEASURES.

### SALE OF OFFICES.

See BOND, 1 to 3.

### SATISFACTION.

See JUDGMENT, 1 to 3, 7, 8.  
MORTGAGE OF LANDS, 1 to 3.  
PARTNERSHIP, 9.

### SCIRE FACIAS.

1. A judgment is a chose in action, within the statute, (2 R. S. 274, § 5, 2d ed.) authorizing assignees, in certain cases, to sue in their own names: and a *scire facias quare executionem non*. is a suit, within the same statute. *Murphy v. Cochran*, 339
2. Where the assignee of a covenant sued and recovered judgment thereon in the name of the assignor, after which the latter died, and no executors or administrators were appointed upon his estate; held, that the assignee might sue out a *scire facias*, &c. in his own name. *id*
3. *Semble*, that the *scire facias*, in such case, should show the residence of the assignor at the time of his death. *id*
4. The *scire facias* reciting the assignment as under the assignor's hand and seal, sufficiently showed that it was made upon a valuable consideration, without the fact being otherwise alleged. *id*
5. Though the covenant was to the assignor and another jointly, yet, as judgment upon it had been recovered in the assignor's name alone, the defendant was held estopped from denying the assignor's right to assign. *id*
6. In *scire facias* by an assignee, it need not appear that the defendant had notice of the assignment. *id*
7. A *scire facias* in the usual form, setting out that *execution yet remains to be made*, is sufficient, without showing in terms that the judgment is unsatisfied. If such be the fact, the defendant may plead it, and that will bar the suit. *id*

8. Where an assignee sues out a *scire facias* in his own name, the assignment being a material and traversable fact, must be set forth with circumstances of time and place, or the defendant may demur. *id*

### SECOND OFFENCE.

See LARCENY, 3, 4, 5.

### SECONDARY EVIDENCE.

See EVIDENCE, 6, 20 to 23, 41.  
PRINCIPAL AND SURETY, 6.

### SELF DEFENCE.

See CRIMES, 2, 3, 4.

### SERVICE OF PAPERS.

See ATTORNEY AND COUNSEL, 4.  
PRACTICE, 25 to 27, 46.

### SET-OFF.

1. A party, to have the right of setting off one judgment against another, on motion, must be the absolute owner of the former in his own right; especially as against persons to whom the defendant therein has assigned the other judgment. *Mason v. W. Knowlson*, 218
2. M., being indebted to K., procured from T. a negotiable note against K.; afterward K. assigned the demand against M., who, on being informed of the assignment, proposed to the assignees to set off the one demand against the other, which the latter refused. Then M. sued the note, and before he obtained a verdict, the assignees sued him in K.'s name, on their demand. The latter suit was tried before M. perfected his judgment; but M., though he continually urged the assignees to a voluntary allowance of his set-off, did not attempt to enforce it in their suit; and judgments were finally rendered on both demands. Some facts appeared, tending (though obscurely,) to show, that M. was a nominal holder of the note for T.'s benefit; and the affidavits of M. and T. did not deny this,

except by stating, in general terms, that the note was transferred *bona fide* and absolutely, for a good and valuable consideration, &c. Held, that under these circumstances, the inference of M. not being the holder of the judgment upon the note in his own right, was too strong to warrant the court either in ordering a set-off of the judgments, or a feigned issue to try the question of fact. *id*

3. Had M. endeavored to get the note allowed as a set-off, in the suit against him, and been defeated, it seems, a feigned issue might have been awarded. *id*

4. A set-off of a judgment, upon motion, will not be refused, merely because the party has neglected an opportunity to set off the subject of the judgment, or the judgment itself, on a trial. *Semble. id*

5. A set-off of a debt due from an assignor, will not be allowed as against his assignee, unless the defendant acquired it *bona fide* before notice of the assignment. *id*

See EVIDENCE, 42, 43.

### SETTING ASIDE PROCEEDINGS.

See PRACTICE, 9 to 15, 24, 43 to 45, 51 to 53.

### SHERIFF.

- .. A sheriff having levied on the personal property of H., in virtue of a *fi. fa.* in favor of B. received another against H., in favor of V. Afterward, by an arrangement between B. and H., the first *fi. fa.* was withdrawn, and H. sold the property, applying the proceeds on B.'s judgment. The sheriff having neglected to proceed against the property under the second *fi. fa.*; held, that he was liable to V. for its value. *Van Winkle v. Udall*, 559

See BAIL IN CIVIL CASES, 1, 2.

BOND, 1 to 3.

CONTEMPT, 6.

DAMAGES, 3, 4.

DEED, 2.

FRAUD, 1, 8.

HABEAS CORPUS, 1 to 3.

See LEVY.

OFFICER, 8 to 12.

PRACTICE, 13, 64, 69

REDEMPTION.

### SLANDER.

See AMENDMENT, 1 to 4.

### SON ASSAULT DEMESN.

See CRIMES, 2 to 4.

### SOVEREIGNTY, NATION/

See CRIMES.

WAR AND PEACE.

### SPECIAL SESSIONS.

See COURT OF SPECIAL SESSIONS.

### STARE DECISIS.

See COMMON LAW.

COURT OF ERRORS, 1.

EVIDENCE, 50, 51.

### STATUTES.

1. *Semble*, that the power of the legislature to interfere with vested rights is unlimited save by the restrictions contained in the federal and state constitutions. *Butler v. Pulmer*, 324
2. Where a statute repeals a former one which imposed a penalty, the right to the penalty becomes extinguished, even though a prosecution for it has been previously commenced. And if the repeal takes place after conviction, the judgment is thereby arrested. *Semble, id*
3. The repeal of a statute conferring jurisdiction, takes away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal. *id*
4. Inchoate rights generally, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute. *id*

5. Otherwise, in respect to such civil rights as have been perfected far enough to stand independent of the statute; or, in other words, such as have ceased to be *executory*, and have become *executed*. *id*
6. Positive enactments are not to be construed as interfering with previously existing contracts, rights of action, or suits, unless the intent thus to interfere be expressed in the enactment. *id*

See CONSTITUTION.  
COMMON LAW.  
POWER, 4.  
REDEMPTION.

### STAYING PROCEEDINGS.

See JUDGMENTS AND EXECUTIONS, 4, 5.  
PARTNERSHIP, 9.  
PRACTICE, 7, 41, 51 to 53.

### STEAMBOATS.

1. The owner of a steamboat is not responsible in an action on the case, for the *wilful* misconduct of the master in running her against and injuring another boat. *The Richmond Turn. Co. v. Vanderbilt*, 480
2. The tenth section of the statute (1 R. S. 683, 2d ed.) relating to the navigation of certain rivers, &c. by steamboats, only enlarges the owner's liability so as to subject him for certain specified *penalties* incurred by the master; and was not intended to trench further upon the common law rights of the former. *id*

See CONSTITUTION, 3.  
DEMURRER TO EVIDENCE, 2.

### STOPPAGE IN TRANSITU.

See FRAUD, 1, 10, 11.

### STREETS.

1. Where D. owned four adjoining lots in the city of New-York and the land in front of them, the latter being designated on the commissioners' map as part of the site of the street: and before the street was opened he sold

three of the lots, bounding the purchasers respectively by *the street*, conveying to them also all his interest in the land within the street adjoining their several lots, *subject to the use of the owners of the lots as a public street*: HELD, that his acts amounted to a dedication of the lands in the site of the street and to the extent of all the lots, to the public use; and therefore, upon the opening of the street, he was entitled to no more than nominal damages for the land taken therefor in front of the *fourth lot*. *In the matter of Twenty-Ninth Street, N. Y.* 189

2. *It seems*, that such a dedication would embrace all D.'s land in the site of the street, to the extent of *the block where the lots sold are situated*. *id*

3. *Quere*, whether it would extend to *all his lands in the site of the street*, however remote from the lots sold. *id*

4. A motion to confirm the report of the commissioners of estimate and assessment, in the matter of opening streets in the city of New-York, cannot be opposed upon affidavits of *parties in interest*; e. g. persons who have been assessed for benefit. *id*

5. One who conveys lands in the city of New-York, bounding the purchaser by a street designated on the commissioners' map, thereby dedicates his adjoining land, in the site of the street, to the public use; so that, on the opening of the street, he will be entitled only to nominal damages therefor and this, whether he bounds the purchaser by the *centre* of the street or the *sides* of it, and though he sells in parcels less than the usual size of city lots. *In the matter of Thirty-Ninth Street, N. York*, 191

6. S., who owned a small strip of land in that city, north of an unopened street designated on said map, and also the adjoining lands in the street and on the south side of it, conveyed the strip to N., designating the north side of *the street* as his southern boundary; and subsequently conveyed the rest to A., designating the same side of *the street* as his northern boundary. *Held* that, by the deed of the strip to N., the adjoining land in the street was dedicated to the public; and though A. had purchased without notice of that deed, and procured his conveyance to be first recorded, he was only

entitled, on the opening of the street, to minimal damages. *id*

7. *Quere*, whether the recording statute could, under any circumstances, affect a right of this nature which had previously accrued to the public. *id*
8. One who has been assessed for benefit by the commissioners of estimate, &c. has a right to oppose the confirmation of their report, where it contains an erroneous allowance to others by which his burthen has been enhanced. *id*
9. The board of trustees of the village of Brooklyn under the act of April 3d, 1827, had a discretionary power to go on or not, in the matter of laying out streets, until the final confirmation of the commissioners' report of damages; and *held*, that a party in whose favor the report was made could have no action either against the trustees, or the corporation of the city of Brooklyn as their successors, for neglecting to file the report, even though he had sustained special damages. *Martin v The Mayor, &c. of Brooklyn*, 545
10. A contract by officers authorized to lay out streets, with an individual in whose favor a report for damages has been signed but not confirmed, purporting to bind the former to do certain acts, in consideration that the latter will waive his rights under the report, is *nudum pactum*. *id*
11. And *semble*, a contract on the part of such officers, importing a surrender of their right to discontinue the proceeding before confirmation of the report, is contrary to public policy, and void; they having no power to part with their discretion in this particular. *id*

#### STRIKING OUT FALSE OR FRIVOLOUS PLEA OR NOTICE.

See PRACTICE, 34, 35, 54 to 56, 63 to 65.

#### SUBJECTION TO THE POWER OF OTHERS.

See CRIMES, 5, 6.  
WAB AND PFACE, 6 to 8.

#### SUBMISSION TO ARBITRATION

See ARBITRATION AND AWARD.

#### SUBPOENA DUCES TECUM

See EVIDENCE, 7.

#### SUBROGATION.

See JUDGMENTS AND EXECUTIONS, 7, 8

#### SUBSCRIBING WITNESS.

See DEED, 6, 7.

#### SUMMONS

See LANDLORD AND TENANT.  
PRACTICE, 10 to 12.

#### SUNDAY.

An attorney's clerk, engaged at a weekly salary to do such things as are usually done by clerks in attorneys' offices, is prohibited by the statute to prevent working on Sunday, from recovering of his principal a compensation *extra* his weekly allowance, for services as a clerk performed on that day. *Watts v. Van Ness*, 76

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 21.

#### SUPERVISORS.

1. The provision in the act for building the bridge across the mouth of *Wappinger's creek* in the county of Dutchess, (commonly called Drake's bridge,) that *when completed, &c. it should be a public bridge, and under the control and direction of the supervisors of the county*, was intended to relieve the towns in which it was located, from the burthen of repairing it, and to impose that burthen on the county. Hence *held*, in this case, that a resolution of the board of supervisors, directing a sum to be levied and raised for repairing the bridge in question, on the towns of Poughkeepsie and Fish-

- kill, was erroneous. *The People, ex rel. The Commissioners of Highways of Poughkeepsie and Fishkill, v. The Board of Supervisors of the County of Dutchess,* 50
8. The bridge being a charge, on the county, and not on the towns, the supervisors might lawfully impose on the former, the raising of a sum sufficient to repair it, notwithstanding they had, in the same year, caused \$1000 to be levied and raised, pursuant to 1 R. S. 524, § 119, 120, relating to bridges which are a charge upon the towns: especially since the act of 1838 to enlarge the powers of boards of supervisors. *id*
9. The third section of the act of 1838, requiring all persons intending to apply for the imposition of a tax to give notice, &c., does not, it seems, restrain the board from acting on their own motion, in raising money for the necessary repair of county bridges. *id*
4. Even had the towns, in this case, been liable for the repair of the bridge, inasmuch as the supervisors thereof had made no application pursuant to 1 R. S. 502, § 4, for a tax on their towns, but only on the county, the board of supervisors, it seems, would have no power to act. Clearly not, under the act of 1838; as there had been no such vote of the towns as that act requires. *id*
5. Although there were two resolutions of the board of supervisors in this case, viz. first, that a specified sum be raised, &c., and second, that it be raised by the towns in question; yet held, that they constituted only one measure; and the relators could not, while resisting the second, compel the board to execute the first, by way of county charge. *id*
6. And the alternative mandamus having, in effect, required this, on demurrer to the return, judgment was given for the defendants; but without costs. *id*
7. Should the board of supervisors omit, hereafter, to adopt the proper measures for repairing the bridge at the expense of the county; quere, whether the remedy would be by mandamus or by indictment against the county. *id*
8. The certificate of town auditors allowing accounts, regular on its face, is a sufficient authority for the board of supervisors to proceed and cause the amount certified to be levied on the town. *The People, ex rel. Onderdonk, v. The Supervisors of Queens County,* 195
9. *Semble*, such a certificate precludes the supervisors from enquiring as to the merits of particular items allowed; and if laid before them at their annual meeting, they are bound to act upon it without modification as to its amount. *id*
10. A certificate of this nature, purporting in the body of it to have been made by "the board of auditors of the town of N. H." is sufficient, though the officers have merely signed their names without adding their official titles. *id*
11. It need not appear on the face of the certificate that the auditors met at the proper time and place; it will suffice, if in point of fact their meeting was regular in those respects. *id*
12. Where all the officers constituting the board of town auditors have met, a majority of them may decide, and their certificate will be valid, though the supervisor has refused to sign it. *id*
13. A board of supervisors, by auditing and paying part of a claim presented, is not thereby precluded from contesting the residue even upon a principle which would show the former allowance to have been improper. *The People, ex rel. Phoenix, v. The Supervisors, &c. of New-York,* 362
14. A mandamus will not lie to a board of supervisors, to control them in the exercise of their discretion as to the amount at which an account presented shall be audited. *id*
15. Where the claim of a district attorney is presented to the board, consisting of costs for prosecuting recognizances, &c. and the costs have been taxed as against the persons sued, quere, whether such taxation is conclusive upon the county. *id*
- See CERTIORARI, 6.
- SUPREME COURT COMMIS.  
SIONER
- See ATTORNEY AND COUNSEL, 2



*See* CONTENT, 9, 10.  
HABEAS CORPUS, 1.  
PRACTICE, 7.

### SURETY.

*See* BAIL IN CIVIL CASES, 1 to 6.  
JUDGMENTS AND EXECUTIONS, 7, 8.  
PRINCIPAL AND SURETY.  
REPLEVIN, 2 to 4.

### SURPLUSAGE.

*See* ARBITRATION AND AWARD, 18, 24.

### SURROGATE.

1. Although by 1 R. L. 447, § 10, a surrogate was required, on granting letters of administration, to take from the applicant a bond with *two or more sureties*; yet the omission to do this was mere *error*, to be corrected on appeal, and not a jurisdictional defect, exposing the proceeding to collateral impeachment. *Bloom and others v. Burdick*, 130
2. In a proceeding under that statute for a surrogate's sale to pay debts, it is essential to jurisdiction that the petition for that purpose should have been accompanied by an account of the personal estate, made at the time, as well as of the debts; and a reference to the general inventory previously filed, will not answer as a substitute for the former. *id*
3. But if the account was, in truth, presented, it will suffice, though named in the proceedings, *an inventory*. *id*
4. And where the petition was presented at the coming in of the general inventory; *held*, that no other account of the personal estate was requisite. *id*
5. The above statute did not require the actual application of the personal estate to the payment of debts, as a condition precedent to the right to petition for sale; but only that such application should have been made prior to the order of sale. *id*
6. Where, in the order of sale, as well as the deed under it, the land was described as "being ninety-one acres of

the south west corner of lot number eleven;" and it was shown that the deceased died seized of just that quantity in the designated lot, and that his land touched the south west corner: *Held*, that the description was sufficient to pass the title to the purchaser *id*

7. Though the surrogate, by the presentation of the petition and account, acquired jurisdiction of the *subject matter*, he did not over *the persons* to be affected; and the latter is as essential to the validity of the sale, as the former. *id*
8. A sale of real estate to pay debts, in virtue of a surrogate's order under the statute referred to, is void as to infant heirs for whom no guardian was appointed. *id*
9. The case of *Jackson, ex dem McFail, v. Crawford*, (12 Wendell, 533,) commented on and explained. *id*
10. The surrogate's court is one of inferior jurisdiction, and a party seeking to make title to real estate under its proceedings, must show affirmatively that it had jurisdiction. *id*

*See* POWER, 3, 4.

## T

### TAXES.

*See* BANK, 1.  
CERTIORARI, 4, 6.  
MANDAMUS, 2.  
POWER, 3.  
PRACTICE, 7.  
SUPERVISORS.

### TENANTS IN COMMON.

1. The owners of a farm agreed with two persons, by contract under seal, that the latter should occupy and work it for a year, and if they performed, then to have it the same way for a year longer; the occupiers agreeing, in consideration thereof, to yield and pay the owners one half of all the grain, &c. raised: *Held* that, until a division, or something equivalent, the parties were tenants in common of the grain; and this, though the contract

contained the technical phraseology of a lease reserving rent. *Putnam and others v. Wise*, 234

2 And held, further, that one of the occupiers having, on the day the contract took effect, sub-contracted with strangers, so as to admit them to share his part of the grain, in consideration of their doing a portion of the farm labor, they became tenants in common in like manner with all the others; and on a subsequent sale and delivery of grain by either, the rest might adopt it and sue for the price in the names of all. *id*

3. An agreement like that between the owners and occupiers in this case, is not sufficient to constitute a partnership. *id*

4. The distinction between a partnership, and a mere joint tenancy or tenancy in common, discussed and illustrated. *id*

5. A sale of chattels by one of several joint owners, for the common benefit of himself and the rest, if subsequently ratified by the latter, becomes, in effect, an original sale by all. *id*

6. Tenants in common must join, in trover for their property tortiously taken. *id*

7. And, *semble*, they may waive the tort, and bring *assumpsit* as for goods sold and delivered. *id*

8. The general doctrine of waiving tort and bringing *assumpsit*, considered. *Id.* Note (a).

9. An agreement between the owner of a farm and the occupier, that the latter shall work it on shares, but not specifying the quantity or amount of either share, constitutes them tenants in common of the produce; and this, whether the agreement is to continue for a single crop, a year, or even, *semble*, for two or more years. Otherwise, however, where the owner's share is fixed; e. g. at so many bushels, or at so much in weight, &c. *id*

10. The form of the agreement, (as whether in the technical language of a lease, reserving rent, or otherwise,) is not decisive in determining the relation between the parties under such circumstances. *id*

11. The cases of *Jackson, ex dem. Col-den, v. Brownell*, (1 John. R. 267,) and *Stewart v. Doughty*, (9 *id.* 108,) considered and questioned. *id*

See EJECTMENT, 1.

## TENDER OF PERFORMANCE

See EVIDENCE, 34 to 37.

## THEFT.

See INSURANCE, 1, 2.  
LARCENY

## "THIEVES."

See INSURANCE, 1, 2.

## TITLE IN A THIRD PERSON

See EJECTMENT, 1, 2, 8.  
PLEADING, 18 to 21.  
REPLEVIN, 1.

## TORT, WAIVER OF.

Cases relating to the general doctrine of waiving tort and bringing *assumpsit*, cited, &c. *Putnam and others v. Wise*, 240, note (a)

See ASSUMPSIT, 10.  
FRAUD, 3, 7, 12 to 16, 20, 28 to 32  
TENANTS IN COMMON, 7, 8.

## TOWN AUDITORS.

See SUPERVISORS, 8 et seq.

## TREATY.

See CRIMES, 6, 7.

## TRESPASS

See FRAUD, 1, 7, 8, 9, 12 to 17, 20.  
OFFICER, 2 to 12.  
PLEADING, 8 to 12, 18 to 21

## TRIAL BY JURY.

*See* CONSTITUTION, 1, 2.  
COURT OF SPECIAL SESSIONS.  
JURY.

## TRIAL, PRACTICE AT.

*See* BILL OF EXCEPTIONS.  
COURT OF A JUSTICE OF THE PEACE,  
3, 4, 5.  
DEMURRER TO EVIDENCE.  
EJECTMENT, 5.  
EVIDENCE, 23, 24, 28, 29, 30.  
INQUEST.  
JURY, 1 to 4.  
NEW TRIAL.  
PLEADING, 4.  
PRACTICE, 1, 2, 28 to 30.

## TROVER.

*See* ASSUMPSIT, 10.  
FIXTURES.  
FRAUD, 7, 12 to 17, 20, 21.  
TENANTS IN COMMON, 6, 7, 8.

## TRUSTEES.

*See* JUDGMENTS AND EXECUTIONS, 1 to 3.

## TURNPIKE LAW.

The general turnpike act, (1 R. S. 580, 2d ed.) confers no power on the commissioners to receive *conditional* subscriptions for stock; and a subscription conditioned that the road shall be laid through a specified place, is contrary to public policy, and void. *Butternuts and Oxford Turnpike Co. v. North*, 518

## U

## UMPIRE.

*See* ARBITRATION AND AWARD, 16 et seq.

## USURY.

1. A party who buys an accommodation note before it has been used for any

business purpose, stands in the same situation in respect to the defence of usury, as if he were the payee named in the note; and this, though he took the note supposing it to be business paper. *Aeby v. Rapelye and others*, 9

2. Such a party is not entitled to be protected as an endorsee or holder in good faith, &c. within 1 R. S. 772, § 5. *id*

3. M. having a large debt against one who had assigned his estate in trust for creditors, applied to the assignees for a loan of \$12,000 from the trust fund, until a dividend should be made; whereupon the latter let him have notes belonging to the estate, which, estimating them at their nominal value, amounted to \$8254.69, besides cash to the amount of \$3745.31, and took therefor M's note for \$12,000, with interest. *Held*, that though there was evidence tending to show the notes which M. received to have been worth at the time considerably less than he allowed for them, the transaction was not necessarily usurious, but depended upon the intent with which the loan was made. *Sizer v. Miller and others*, 227

4. *Held* further, that a report of referees, stating that they had examined the evidence, and were of opinion *as matter of law*, that the transaction was usurious, implied that they had not passed upon the question as one of intent, and was therefore erroneous. *id*

5. *Cowen, J.* dissented, holding that the report did not necessarily imply this, but was equivocal: and there being evidence from which it might be sustained as a general report in favor of the defendants, the court ought not to interfere. *id*

6. *Semble*, it is not admissible, in such cases, by way of rebutting the usurious intent, to enquire of the party who made the loan *whether there was any intention, shift or device, on his part, to get more than seven per cent, &c.*; for that is calling on him to pronounce broadly upon the very point in dispute. *Per Cowen, J.* *id*

7. Though a note is prosecuted in the name of a mere nominal holder, the defendant cannot examine the party in interest to prove it usurious, without his consent; for the act of May 15th,

1837, (*Sess. L. 1837, p. 486, § 2,*) only gives this right as against the plaintiff on the record. *Bank of Salina v. Henry, impleaded with Pierce,* 555

9. Proof that a note was usurious in its inception is sufficient even as against an endorsee, and under 1 R. S. 772 et seq., to cast upon him the onus of showing that he paid a valuable consideration for it. *Seymour and others, executors, &c. v. Strong,* 563

9. *Quere,* whether having shown this he may rely on the date of the endorsement, and the fact of subsequent possession, as *prima facie* evidence of the other requisites necessary for his protection within § 5 of the above statute. *id*

See NEW TRIAL, I.

## V

### "VALUE RECEIVED."

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 42.

### VARIANCE.

1. A middle letter in one's name is no part thereof, and a variance in this respect between a written contract as set forth in the pleadings, and that produced in evidence, is immaterial. *Milk v. Christie & Todd,* 102

2. A copy of a note or bill of exchange subjoined to a declaration, pursuant to the act of April 25, 1832, c. 276, makes no part of the declaration with a view to questions of variance between the pleadings and proofs. *Commercial Bank of Lake Erie v. Norton & Fox, impleaded, &c.* 501

3. A mere literal variance between a contract as set forth in pleading, and the one produced in evidence, is immaterial. *Coonley v. Anderson,* 519

4. A contract for a crop of barley to be delivered at a future day, specifying the price, but no time of payment, is, in legal effect, a contract to pay on delivery, and may be so declared on. *id*

5. Where the declaration alleged a contract to sell "a crop of barley, supposed to be about nine hundred bushels," and the one produced in evidence was, to sell "a crop of barley about nine hundred bushels;" *held,* not a material variance. *id*

6. So, the declaration stating a contract to deliver barley, "on or before the first day of November;" *held,* not a material variance, though the contract given in evidence was, to deliver the barley "by" that day. *id*

See AMENDMENT, 4.  
EJECTMENT, 3 to 7.  
PRACTICE, 10, 11.

### VENDUE.

See OFFICER, 15.

### VENUE IN CIVIL CASES.

See BAIL IN CIVIL CASES, 3 to 6.  
PRACTICE, 3 to 6, 41, 42, 57 to 61.

### VENUE IN CRIMINAL CASES.

See PRACTICE, 3 to 6.

### VERDICT.

See COURT OF A JUSTICE OF THE PEACE, 6  
COURT OF SPECIAL SESSIONS.  
FRAUD, 22 to 27.  
JURY.  
PRACTICE, 1, 2.  
PRINCIPAL AND SURETY, 2, 3.

### VERIFYING PLEA.

See COURT OF A JUSTICE OF THE PEACE, 9  
PLEADING, 4.  
PRACTICE, 16 to 23, 31, 35, 38.

### VESTED RIGHTS.

See STATUTES.

## W

## WAIVER OF TORT.

See TORT, WAIVER OF.

## WAR AND PEACE.

1. A state of peace, and the continuance of treaties, are to be presumed by every court, until the contrary be shewn; and this is *presumptio juris et de jure*, until the national power of the country where the court sits, officially declares the contrary. *The People v. Alexander McLeod*, 377
2. To constitute public war, at least two nations in their corporate capacities, are essential parties. *id*
3. The three sorts of war, viz. *public*, *private*, and *mixed*, defined and considered. *id*
4. War is none the less public, though it be *unsolemn*, i. e. carried on under special declaration, confining hostilities to specified persons, places or things; and like *solemn* or perfect war, to be lawful, it must be authorized by the war-making power. *id*
5. A nation can only exercise the right of war within its own territory, or that of its enemy, or in one which is vacant; and this whether the war be *public* or *mixed*. *id*
6. An order of a nation at war, for the destruction of the life or property of its enemy within the territory of a neutral power, is void, and affords no protection to persons acting under it. *id*
7. A sovereign has no right to compel his subject to enter a neighboring territory and commit an *unlawful* act, either in time of peace or war. *id*
8. Homicide is presumed malicious until the contrary appear; and whether justifiable or excusable upon the facts, as an act of war, or self defence, &c. is a question for the jury to determine. *id*

See CRIMES.

## WARRANT OF ARREST OR COMMITMENT.

Warrants of arrest and commitment need not contain the facts on which the charge made is predicated; but are sufficient, in this respect, if the nature of the offence be clearly specified. *The People v. Alexander McLeod*, 377, 398, note (e)

See CONTEMPT.  
HABEAS CORPUS.

## WARRANTY.

See INSURANCE, 13 to 16.

## WEIGHTS AND MEASURES.

1. A contract to deliver 1000 "*bushels of good merchantable wheat*," &c. is complied with by the vendor's tendering a quantity of wheat, merchantable in fact, and equal in the aggregate to 1000 bushels *statute weight*, though it will not fill the statute *measure* of eight gallons to the bushel. *Milk v. Christie & Todd*, 102
2. In general, the term *bushel* in a contract, calls for a quantity equal to eight gallons; but in respect to wheat, rye and indian corn, there is an exception; and in sales of these, the term *bushel* is satisfied by a quantity equal in *weight* alone to the statute requisition, unless the parties have otherwise agreed. *id*

## WILL

1. A., by his will, after making various specific devises, gave to his brother and three sisters, his interest in eighty acres of land which he and they owned in equal undivided proportions; and then constituted B. residuary devisee as to his other real estate. A., having afterward purchased the shares of his brother and sisters in the eighty acres, made a codicil revoking the clause in the will devising his interest in the eighty acres. *Held*, that at his death the shares of his brother and sisters purchased by him after the execution of the will, passed under it to the residuary devisee; but the other share having been specifically devised, dev

cended to his heirs, though by reason of the codicil, that devise, as such, was rendered inoperative and void. *Van Cortlandt and others v Kip*, 590

2. A codicil to a will of real estate, when executed in the mode prescribed with respect to devises, will amount to a republication of the will, bringing down its language and causing it to speak as of the date of the codicil; and this, whether the immediate subject of the codicil be real or personal property. *id*
3. A codicil need not be *actually annexed* to the will, in order to have it operate as a republication. *id*
4. Where a codicil is so executed as to operate a republication of the will, both should be read and construed together as one entire instrument. *id*
5. Though a devising clause in a will be utterly void as such, at the time when it is made, or be annulled afterward by a codicil, yet it may operate as a declaration of intent to prevent the property passing to the residuary devisee. *id*
6. Otherwise as to a bequest; for the residuary legatee takes all the personal property which, at the testator's death, is not found to have been otherwise *effectually disposed of* by the will. *id*
7. The distinction between devises and bequests in this particular has not been abolished by 2 R. S. 2, § 5, 2d ed. *id*

See EVIDENCE, 38, 40.  
POWER.

### WITNESS.

1. In an action for *crim. con.* with the plaintiff's wife, *held*, that after a divorce *a vinculo matrimonii*, she was a competent witness for the husband to prove the charge laid. *Ratcliff v. Wales*, 63
2. But a wife is generally incompetent, even after divorce, to testify *against* the husband, as to facts occurring during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character. *id*
3. Otherwise, *semble*, as to facts occurring after divorce. *id*

4. In cases of bastardy involving the adultery of the wife, she is incompetent to prove non-access of her husband; but from necessity she is admitted to prove the criminal intercourse. *id*
5. Where, in ejectment for dower, the defendant offered B, his landlord, as a witness, and it appeared that B. had leased to the defendant for years, with a covenant for quiet enjoyment; and that B.'s title was a lease in fee from V., containing a like covenant, and reserving rent and a quarter sale; *held*, that B. was incompetent notwithstanding V.'s covenant to him, his interest preponderating in favor of his tenant. *Moak v. Johnson*, 99
6. The possession of the tenant being that of the landlord, in ejectment against the former, the latter is, in general, incompetent as a witness for him. *id*
7. Where an action, though in form *ex delicto*, is, in fact, founded on a joint contract of the defendants and a person offered by them as a witness, (e. g. case, against common carriers,) the rule that joint tort-feasors are not liable to contribute, does not apply, and the witness is incompetent. *Curtis and another v. Monteith*, 356
8. The rule, that a release by one of several joint creditors, discharges the debtor as to all, does not apply to releases by partners, *inter se*. *id*
9. Four of several partners were sued, and on the trial, a member of the firm not sued was offered as a witness for the defendants; *held*, that a release by two of the latter, did not render the witness competent, as it still left him liable to contribution in respect to the other members of the firm. *id*
10. At common law, no one can be compelled to testify to facts showing himself guilty of a misdemeanor. *Bank of Salina v. Henry, impleaded with Pierce*, 555
11. A member of a partnership or unincorporated banking association cannot be compelled to testify against them in a suit prosecuted for their benefit in the names of others. *Cook and another v. Spaulding and others*, 586
12. The privilege of a party in interest of refusing to testify has not been affected by 2 R. S. 465, § 71. *id*

*See* **ARBITRATION AND AWARD**, 9.  
**BILLS OF EXCHANGE AND PROMISSORY NOTES**, 26.  
**DEED**, 6, 7.  
**DEPOSITION**.  
**EVIDENCE**, 4 to 13, 20 to 23, 25, 28 to 31, 37.  
**JUSTICE OF THE PEACE**.  
**PRACTICE**, 49, 50.  
**USURY**, 6, 7.

**WORK, LABOR AND SERVICES.**

*See* **SUNDAY**, 1.

**WRIT OF INQUIRY.**

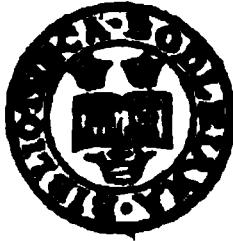
*See* **INQUEST**.  
**PRACTICE**, 43 to 45, 62.

**WRIT OF PROHIBITION.**

*See* **PROHIBITION**.

**WRIT OF REPLEVIN.**

*See* **PRACTICE**, 9 to 15.



**END OF VOLUME FIRST.**









